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WALTER S. COOPER, Plaintiff and Appellant, vs. LESLIE SALT COMPANY, et al., Defendants and Respondents,	California Supreme Court Number S. F. No. 22616
WALTER S. COOPER, Plaintiff and Appellant, vs. T. JACK FOSTER, et al., Defendants and Respondents.	California Supreme Court Number S. F. No. 22617
WALTER S. COOPER, Plaintiff and Appellant, vs. ESTERO MUNICIPAL IMPROVEMENT DISTRICT, et al., Defendants and Appelants, T. JACK FOSTER, et al., Interveners and Respondents.	California Supreme Court Number S. F. No. 22619

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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The Petition of Walter S. Cooper for a Writ of Certiorari to review the judgments of the Supreme Court of the State of

California which were made in the above-entitled matters on March 20, 1969, is hereby respectfully presented.

CITATION TO OPINIONS OF THE CALIFORNIA SUPREME COURT

The Opinion of the California Supreme Court in Cooper vs. Leslie Salt Company, et al., and Cooper vs. Foster, et al., appears as a consolidated opinion in the Official Advance Sheets of the Supreme Court of California at Volume 70 Advance California at Page 669. That Opinion also appears in Volume 75 of the West California Reporter at page 766, and in Volume 451 Pacific, 2nd Series, at page 406.

The Opinion of the California Supreme Court in Cooper vs. Estero Municipal Improvement District, et al., appears at Volume 70 Advance California at Page 687. That Opinion also appears in Volume 75 of West California Reporter at Page 777, and volume 451 Pacific, 2nd Series, at Page 417.

On April 17, 1969, the Supreme Court of the State of California denied a re-hearing in Cooper vs. Leslie Salt Company and Cooper vs. Foster, and at the same time the California Supreme Court modified the Opinion in those matters to substitute the word "twenty-two" in place of the word "two" on page 678 at line 14 of the Opinion as it appears in Volume 70 Advance California. Also on April 17, 1969, the California Supreme Court denied a re-hearing in Cooper vs. Estero, and at the same time the California Supreme Court modified the Opinion in Cooper vs. Estero by striking the words "the association" which appear on page 691 at lines 14 and 15 of the Opinion in that matter as it appears in Volume 70 Advance California.

Each said Opinion, showing said Modifications, is set forth at the end of this Petition. By this Petition for Writ of Certiorari, Petitioner seeks a review by the United States Supreme Court of each of the aforesaid Decisions of the Supreme Court of the State of California.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

The date and time of filing of both judgments of the Supreme Court of the State of California for which petitioner seeks review is March 20, 1969.

The date of the Order Denying a Re-Hearing in each of said cases was April 17, 1969.

Petitioner in seeking review by the Supreme Court of the United States of the afore-described decisions of the Supreme Court of the State of California, relies upon Title 28 United States Code, Section 1257, which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . .
>
> "(3) By writ of certiorari, . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of. . . the United States."

THE QUESTIONS PRESENTED FOR REVIEW

The questions presented by the Petition for review in the Supreme Court of the United States are, expressed in concise terms, as follows:

I. Is the State of California denying the Petitioner his right under the 14th Amendment to the United States Constitution to equal protection of the laws where two-fifths of the voting power of his local government is granted to landowners only, one vote per dollar of assessed valuation, and that government is a government of general powers including the power to maintain a police department, to enact penal statutes, to lay and collect real and personal property taxes, to issue unlimited

amounts of general obligation bonds, and to spend the public monies for all purposes connected with the preparation of land for residential subdivision sales?

II. Has the State of California denied the Petitioner his right under the 14th Amendment to the United States Constitution to equal protection of the laws where it allows a two year delay in the enforcement of full voting rights of petitioner and 8,000 of his fellow residents and taxpayers, where such delay in enforcement of voting rights is permitted to protect the interests of the land developer who has entirely and now partially controls the local government district by reason of a property qualification for voting?

III. Has the State of California denied the Petitioner his right under the 14th Amendment to the United States Constitution to due process of law where it refuses to compell an accounting from a land developer for the financial benefits that the land developer caused a public entity to bestow upon the land developer when the land developer controlled the public entity under a state law providing for voting by landowners only, one vote per dollar of assessed valuation, and the public entity has general powers of government including the power to lay and collect from the Petitioner real and personal property taxes?

IV. Does the State of California violate the rights of its citizens under the United States Constitution where the State of California, by special acts such as the Estero Act (Cal. Stats. 1961, 1st Ex. Sess. 1960, ch. 82, p. 459), makes general governmental powers, including unlimited borrowing powers and and unlimited powers to lay and collect real and personal property taxes "serviceable to land developers" by the devise of describing the district as being the land owned by the developer and then placing a real property ownership qualification on voting?

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES WHICH THE CASE INVOLVES

Constitution of the United States, 14th Amendment, provides in part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Act to Create the Estero Municipal Improvement District, which is commonly known as the Estero Act, and which is cited as California Statutes, 1961, 1st Extra Session 1960, Chapter 82, Page 459, is set forth at the end of this Petition. All questions involved in this Petition for Review concern the Estero Act and the operations of the purported governmental district which that Act was enacted to create.

STATEMENT OF THE CASE

Petitioner Walter S. Cooper seeks review of what appears to be three cases, but is actually two cases, both of which sought representative government and public financial integrity in the Estero Municipal Improvement District.

The first action was filed in San Mateo County Superior Court as Action Number 126789 on December 3, 1966, in the form of an action at law for a declaration of the legal effect of the Estero Act and legal remedies against the land developer and for the benefit of the Estero Municipal Improvement District and its taxpayers and residents. Demurrer was sustained without leave to amend in favor of all defendants, but judgment was entered at one time for some defendants and at another time for other defendants. This resulted in two notices of appeal and

two titles and numbers in the Supreme Court – that is, Cooper vs. Leslie Salt Company, et al., California Supreme Court Number S. F. No. 22616, and Cooper vs. T. Jack Foster, et al., California Supreme Court No. 22617. Both were disposed of in one Decision in the California Supreme Court, which appears in the Official Advance Sheets as 70 Advance California 669.

The second action was filed in San Mateo County Superior Court as Action Number 127132 on December 20, 1966, in the form of a Petition for a Writ of Mandate seeking a mandate of the Superior Court to direct the Estero Municipal Improvement District to remedy the invasion of Petitioner's constitutional rights and to obtain an accounting from the land developer of the financial benefits it received from the Estero Municipal Improvement District while that District has been under the control of the land developer. The title and number of this proceeding in the Supreme Court of the State of California was Cooper vs. Estero Municipal Improvement District, et al., S. F. No. 22619. The decision of the Supreme Court of the State of California was rendered on the same day as in the other consolidated matter, that is, March 20, 1969, but appears as a separate opinion in the Official Advance Sheets as 70 Advance California 687.

By this Petition for a Writ of Certiorari Petitioner Walter S. Cooper seeks a review of both the California Supreme Court decision at 70 Advance California 669 (Cooper vs. Leslie Salt Company, et al.; and, Cooper vs. Foster, et al.) and also the California Supreme Court decision at 70 Advance California 687 (Cooper vs. Estero Municipal Improvement District, et al.)

STATEMENT OF THE FACTS

Most of the important facts of this case can be found at various places in the aforesaid California Supreme Court Opinions review of which is sought herein.

All of the matters of which Petitioner seeks review are concerned with the constitutionality, operation, and effect of

the special act of the California Legislature which created the Estero Municipal Improvement District. This act is commonly referred to as the Estero Act and is cited as Stats. 1961, lst Estra Session 1960, Chapter 82, Page 459. (The Estero Act is set forth at the end of this Petition for Certiorari.)

Petitioner will quote from portions of the said Opinions of the Californis Supreme Court in setting forth the facts and will refer to the Official Advance Sheets of the Supreme Court of California ((70 Advance California)) to show the places in the said Opinions where the references are obtained. In quotations from the California Supreme Court Opinions the Estero Act sections are referred to by references to the numbers of the sections of the act as it was enacted, but without the identifying words "Estero Act" adjacent to the section reference. These are the same section numbers which appear in the Estero Act as it is set forth at the end of this Petition for Certiorari.

"The act prescribed the boundaries, organization and powers of the district, as well as the methods for its operation, management, financing, change of boundaries, and dissolution. . . " ((70 Advance California 673)).

"The statute recited that 'The land in the district is not owned by the residents. The owners are the ones primarily concerned with the district and the ones who will be supporting the district. The owners should therefore hold the voting power.' (Sec. 215, Subd. (f).) Thus it was provided that voting was to be upon the basis of assessed valuation of land (Secs. 17, 19, 20, 64), and that the district was to be governed by three directors (Sec. 26) who must be 'owners, or officers or legal representatives of owners' (Sec. 28). The statute places a broad array of municipal functions within the powers of the district, including provision of street lighting, sewerage, storm drainage, garbage service, water service, parks, and playgrounds, and reclamation of land (Sec. 77). The district is also empowered to construct small craft harbors (Sec. 78), provide fire protection (Sec. 79), and 'make and enforce all necessary and proper regulations, not in conflict with the laws of this State, for the ... supplying of . . . police protection service. A violation of a

regulation of the district is a misdemeanor punishable as such.' (Sec. 97) The statute includes elaborate financial provisions, including authorization for the directors to issue general obligation bonds (Secs. 105-123) and other types of securities to raise money for development of raw land included within the district so that the owners thereof, who absolutely control the district, can cause the various improvements to be made which are necessary to make the land fit for marketing as a residential tract." ((70 Advance California 673-674)).

"It appears that at the time the district was created by the Legislature in 1960 it comprised some 418 uninhabited acres under a single ownership, that thereafter it annexed adjacent territory (Sec. 205) so that it now totals some 2,600 acres, and that as improvement and development have proceeded the district has acquired residents." ((70 Advance California 680)). These residents now total more than 8,000 persons. ((70 Advance California 687)).

After describing the power granted to the land owners by the Estero Act to issue general obligation bonds to raise money for improvements to make the land fit for marketing as a residential tract, the Opinion of the Supreme Court of California in Cooper vs. Foster and Cooper vs. Leslie Salt Company directs the reader, at 70 Advance California, page 674, to "Willoughby, *The Quiet Alliance*, (1965) 38 So.Cal.-L.Rev. 72, for a review of several comparable special statutes under which governmental powers have been made serviceable to land developers." At page 73 of 38 So.Cal.L.Rev. that article makes reference to the Estero Act in the following words: "The current trend to subsidize land development with publicly raised funds began in 1960 with the introduction of special legislation to subsidize two specific development projects. Having obtained an option to purchase 2600 acres of San Francisco Bay tidelands, one large developer had a northern California bond counsel draft special legislation to establish the Estero Municipal Improvement District. Supported actively in the Legislature by the same bond counsel, the measure passed without difficulty. The resulting district was contiguous with

the developer's land holdings, was controlled by him and was authorized to issue general obligation, revenue and special assessment bonds at his discretion." This article, at pages 78 and 79 of 38 So. Cal.L.Rev., described the effect of the Estero District and other such land developer controlled districts in California as follows:

"Although the use of special districts to finance development projects is obviously advantageous to potential developers, as a matter of public policy it bristles with danger. In the first place, the use of a public agency to perform an essentially private and propriety service provides no guarantee that any lasting 'public interest' is served thereby. Subsequent land owners have no real voice in such a shadow agency. It will have incurred its major indebtedness and concluded its principal activities prior to their residence in the district. Yet these homeowners, not the original developer, become responsible for repayment of district indebtness. Moreover, if the project does not fully achieve the expectations of the developer, these homeowners will be confronted with soaring debt ratios and excessive tax rates."

". . .

"[those who draft such legislation] are warping and twisting the traditional concept of a special district as a public agency created to effect a public purpose and a public benefit. In its place they are substituting the developer-owned and developer-controlled special district--a public agency created solely for immediate and specific propriety benefit." Such is the opinion of the Estero Act expressed in the only legal authority cited by the California Supreme Court specifically mentioning that act or discussing its legal effect.

The decision of the California Supreme Court at 70 Advance California 669 which is titled Cooper vs. Foster and Cooper vs. Leslie Salt Company both arose out of a single San Mateo County law suit titled Cooper vs. Foster in which the complaint alleged:

"On or about May 11, 1960, at the instance and request of defendants T. JACK FOSTER and T. JACK FOSTER & SONS,

there was enacted by . . . the State of California . . . a certain special law entitled 'An act to create the Estero Municipal Improvement District. . .' Said act purports to create a political subdivision of the State of California, but does not do so because it is in violation of the Constitution of the United States of America and the Constitution of the State of California." (Cooper vs. Foster Clerk's Transcript, Page 4, line 18 through Page 5, line 3).

"Said act is in conflict with the Constitution of the State of California in that, among other things, it violates Article 11, Section 6 of the Constitution of the State of California which states: 'Corporations for municipal purposes shall not be created by special laws.'" (Cooper vs. Foster Clerk's Transcript, Page 5, line 5 through line 10).

"Said act and the purported district are in conflict with the Constitution of the United States of America in that, among other things, the power to vote in said district is divided according to assessed valuation rather than equally among persons." (Cooper vs. Foster Clerk's Transcript, Page 5, lines 18 through 22).

"Said act and the purported district are in conflict with both the Constitution of the State of California and the Constitution of the United States of America in that said act was not enacted pursuant to any authority or plan of law and constitutes an unauthorized special law which has the effect of [an] unauthorized delegation of the legislative powers of the State of California and if enforced would deprive plaintiffs of their property without due process of law, all for the special advantage of private interests of certain of the defendants." (Cooper vs. Foster Clerk's Transcript Page 5, line 24 through Page 6, line 7).

"Said defendant T. JACK FOSTER & SONS have so dominated and controlled said ESTERO MUNICIPAL IMPROVMENT DISTRICT that it has no existence independent of said T. JACK FOSTER & SONS and has been used to promote and finance the real estate development activities of said T. JACK FOSTER & SONS and only incidentally for

public purposes. . . By virtue of said control and domination said T. JACK FOSTER & SONS have obtained great private monetary advantage for themselves . . . which should be restored by them . . . to the . . . DISTRICT. (Cooper vs. Foster Clerk's Transcript Page 8, line 9 through Page 9, line 3)

In the first amendment to the complaint plaintiff added the allegation that "as a result of said domination and control, including control over disbursements of said ESTERO MUNICIPAL IMPROVEMENT DISTRICT by the individual and corporation FOSTER defendants, said defendants are subject to all the duties and obligations of fiduciaries toward said ESTERO MUNICIPAL IMPROVEMENT DISTRICT."

In the second amendment to the complaint plaintiff alleged that $1,667,183.80 of the funds of the Estero District had been paid directly to Midwest Dredging Corporation which was a corporation owned by the Foster defendants and that $860,218.05 of the funds of the Estero District had been disbursed in twenty-two checks to a certain Associated Dredging Company, but these funds had also, by endorsement of the checks, reached said Midwest Dredging Corporation, and that these disbursements had been caused by one W. A. Innes who was a director of the District and an agent and employee of T. Jack Foster & Sons. (Cooper vs. Foster Clerk's Transcript, Page 28, line 5 through Page 29, line 11).

In Cooper vs. Estero, Walter S. Cooper, as Petitioner, sought a Writ of Mandate in regard to the same facts as were alleged in Cooper vs. Foster, however because of a lapse of time it was possible for a more detailed statement of facts on some issues. The most complete statement of petitioner's claims in Cooper vs. Estero is found in the so-called "Cross-Complaint of Defendant in Intervention Walter S. Cooper". (Cooper vs. Estero, Clerk's Transcript, Page 201 through Page 229).

In the Second Cause of Action of that "Cross-complaint of Defendant in Intervention Walter S. Cooper" set forth the property qualification for voting in the District and the fact that the majority of voting power was always held by T. Jack Foster & Sons because of that property qualification. (Cooper

vs. Estero Clerk's Transcript, Page 210 line 21 through line 31). Petitioner then alleged in detail that while T. Jack Foster & Sons controlled the Estero District it caused the District to disburse millions of dollars of public money of the District to T. Jack Foster & Sons. (Cooper vs. Estero, Clerk's Transcript, Pages 211 through 213). Petitioner also alleged in that cause of action that T. Jack Foster & Sons caused the District to improve lands of T. Jack Foster & Sons at great public expense and then caused those lands to be sold to the District or other public bodies without reimbursing the District from the sale proceeds for the cost of improvement, thus leaving the District and the public with no source for the repayment of the debt incurred for the improvement. (Cooper vs. Estero Clerk's Transcript, Page 213 line 10 through Page 214 line 10). Petitioner alleged that he has requested that the Estero District obtain an accounting from T. Jack Foster & Sons but that the District and T. Jack Foster & Sons have refused the request, and that T. Jack Foster & Sons is obliged to make such an accounting because T. Jack Foster & Sons has voluntarily assumed the position of trustee or fiduciary for the District. (Cooper vs. Estero Clerk's Transcript Page 214 line 24 through Page 214, line 2.)

In the Ninth Cause of Action of Cooper vs. Estero petitioner alleges that he and all other Taxpayers of the Estero Municipal Improvement District are being deprived of their Constitutional, property, and personal rights by the Estero Municipal Improvement District in violation of the Constitution of the United States of America, and the Constitution of the State of California, in that, among other things:

(a) the public credit and monies of the Estero District are being loaned to T. Jack Foster & Sons in violation of California Constitution Article 4 Section 31;

(b) the denial of the right to vote to citizens of the Estero District like Walter S. Cooper who do not own real estate in the District is a violation of the Equal Protection Clause of the Constitution of the United States of America and of Article 2, Section 24 of the Constitution of the State of California which

forbids the making of a property qualification as a requirement of voting; [Petitioner Walter S. Cooper lives in the Estero District upon land which he rents and upon which he has placed improvements valued at $42,000, and his real and personal property taxes exceeded $1700 in the year the suit was filed, about a third of which sum was payable to the Estero District, but since he was not a landowner he had no vote at all that year. (Cooper vs. Foster, Reporter's Transcript, Page 104, lines 5-10; Page 144, lines 6-24). Under the amendment to the Estero Act Petitioner Cooper may vote for only two out of the five directors of the District. (Cooper vs. Leslie Salt Company, Supreme Court Opinion, Footnote 3, 70 Advance California at page 674.)]

(c) the entire scheme of the Estero act is in violation of the California Constitution and the Fourteenth Amendment to the Constitution of the United States in that the police powers, public spending and borrowing powers, and taxing powers are exercised by private persons though a disenfranchised public must pay the taxes and the public debt thus incurred. (Cooper vs. Estero Clerk's Transcript, Pages 226 through 227).

As stated in the footnote of the Opinion of the Supreme Court of California in Cooper vs. Leslie Salt Company, 70 Advance California at page 674, since this action was filed the California Legislature amended the Estero Act to increase the number of directors to five and permit two of those five to be popularly elected.

In the actions for which review is sought, Walter S. Cooper prayed for relief which may be summarized as follows: a declaration upon the Constitutionality of the Estero Act; a Court enforced election in the Estero District, on the basis of one man one vote; and an accounting of the financial transactions between the District and T. Jack Foster & Sons, the land developers who controlled the District. The Supreme Court of the State of California denied each of these prayers holding that general demurrers had properly been sustained to the complaint and the petition of Walter S. Cooper in both matters.

ARGUMENT

While petitioner would be most pleased to have the opportunity to brief the points involved in this matter to whatever extent that the Court might wish, petitioner shall make a somewhat short legal argument because petitioner is convinced that the issues are basic and simple.

I

Constitutionality of the Estero Act

In the Opinion of the California Supreme Court in Cooper vs. Leslie Salt Company at 70 Advance California, from the bottom of Page 674 through the bottom of Page 676 the California Supreme Court disposes of petitioner's claims that the Estero Act is Unconstitutional by ruling that only the attorney general can contest the proceedings leading to the formation of a district and that the Estero Act is not patently Unconstitutional. The California Supreme Court also mentions without comment that "A judgment purporting to establish the constitutionality of the act creating the district and the validity of the district's bonds was rendered in a noncontested *in rem* proceeding in the Superior Court of San Mateo County on July 20, 1961." On the foregoing grounds the Supreme Court of the State of California declined to take up the question of Constitutionality. The California Courts have held that quo warranto is not the exclusive remedy for testing the Constitutionality of an Act of the Legislature which establishes a governmental subdivision, but on the contrary, the California Courts have ruled that a private citizen may question the Constitutionality of all or part of such an act. Brandenstein vs. Hoke (1894) 101 Cal. 131 [35 P. 562]; Miller & Lux vs. Board of Supervisors (1922) 189 Cal. 254; and Gilgert vs. Stockton Port District (1936) 7 Cal.2nd 384. The very words of the Court show that its Opinion is incorrect. It is the proceedings to establish a district which are immune from attack by a citizen,

not the Act under which the district is purportedly established. Furthermore the immunity, if any exists, is an immunity from attack upon the existence of the District, and does not give it license to perpetually invade the Constitutional rights of Petitioner and others. "A validating act cannot cure jurisdictional defects, but cures only such defects and irregularities as could have been omitted by the legislature in the first instance." Miller & Lux vs. Board of Supervisors (1922) 189 Cal. 254. The conclusion of the Supreme Court of California that the Estero Act is not Unconstitutional on its face is not supported by any explanation or discussion of the Constitutional issues involved in the Act. Among the many Constitutional questions that are raised by a reading of the act, it clearly appears that the Act purports to create a District with general powers of government while imposing a quantative property qualification on the right to vote. The effect of the ruling of the Court is apparently to make the Estero District, and consequently the land developers who have been controlling it, immune from any assertion of Constitutional rights by Petitioner and other taxpayers.

In determining that the land owner should have such a vested interest in local government the California Supreme Court relies upon findings in the Estero Act by which the Legislature asserted that there were unique conditions at the site of the land developer's property which was to be the area of the Estero District. Such findings are made as a matter of form by the California Legislature when it establishes special districts for land promotion. The wording in each case is identical. (Cooper vs. Foster Clerk's Transcript, page 46).

While voting rights is the obvious and fundamental Constitutional question in this case, it is property rights and not political rights which are the principal concern of the Petitioner and other parties involved with the Estero Municipal Improvement District. Petitioner and others have not complained about the operation of their local police force under the control of the land developer, but they have complained about the incurring of public debt, the spending of public money and the levy of taxes under the control of the land developer.

Similar complaints were made of King John of England 750 years ago, and he then granted the Magna Carta, which is regarded as a foundation of representative government, and sets forth principles of due process of law such as are guaranteed by the 14th Amendment to the Constitution of the United States of America.

In Section 15 of the Magna Carta there is a guarantee that the sovereign will not do the very thing which was done by the California Legislature when it enacted the Estero Act. Section 15 of the Magna Carta provides: "We will not for the future grant to any one that he may take aid of his own free tenants, . . ."

Thus the sovereign has guaranteed that it will not grant to any one the power to collect taxes from other persons, but the Estero Act placed the control of the public borrowing, spending and taxing powers in the hands of the land developer, and the land developer has been exercising that control even to the extent of disbursing the public monies to himself, but the Supreme Court of California will not place the government under control of the citizens nor will it direct an accounting of the disbursements of public money to the land developer made while he controlled the district. The State of California has thus given to a private land developer the public powers and public assets, in violation of basic principles of law and of the California Constitution, Article 4 Section 31, and, since petitioner and other residents must repay the debt incurred by their taxes in the Estero District, the petitioner and other residents of the Estero District are deprived of their property without due process of law by the Estero Act and by the refusal of the California Supreme Court to remedy the improper past and future operation of the Estero District.

II

Voting Rights of Petitioner

The most obvious Constitutional defect of the Estero Act is the property qualification for the right to vote. Petitioner

respectfully refers to the dissenting opinion of Justice Mosk in Cooper vs. Leslie Salt Company at 70 Advance California pages 681 through 687, which opinion sets forth as well as Petitioner might the argument for enforcement of the "one man one vote" principle in the Estero Municipal Improvement District. Even the majority in that Opinion do not seem to rule that Petitioner is not entitled to the full voting rights under the "one man one vote" principle, but seem to rule, at 70 Advance California 680, that the land owners have some right arising out of their land ownership to a delay until late 1971 in the enforcement of the "one man one vote" principle. Justice Mosk states in his dissent in Cooper vs. Leslie Salt Company, at 70 Advance California page 681:

> "Many of the problems giving rise to plaintiff's dissatisfaction would dissolve if the people of the district had been, as everyone should be in a democratic society, the masters of their own destiny. Here the effective political and economic power rests not with the residents of the district, but with a regency. Like a vicarious government during a monarch's childhood, this district is ruled as if the people required protective guidance during their minority. However tolerable in another milieu, such paternalism is undesirable and invalid in this year 1969."
>
> "...
>
> "In my view, the Estero Act, as it presently exists, unquestionably violates the precepts laid down in *Avery vs. Midland County* (1968) 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114], and the majority's holding that compliance with those constitutional principles may be deferred until a future date cannot be justified."

Justice Mosk continues at 70 Advance California Pages 686 and 687:

> "In the present case no obstacles to the immediate conduct of elections on a one-man, one-vote basis exist, and only the statutory postponement of the exercise of those rights until 1971 impedes implementation. This

action was filed in 1966, before the Legislature had made any provisions for elected representation of nonlandowners on the board. Three years have elapsed since that time and almost three more years will pass before the composition of the board complies with constitutional mandates. To wholly or partially deprive more than 8,000 residents of their constitutional right to an equal vote in unjust. That the injustice is to be cured in the future makes it no less unjust today."

III

Right of Petitioner that the Land Developer Account to the Estero District

It is a basic principle of law that where a fiduciary deals with the subject of his trust he has a duty to account to show that he did not secure an advantage for himself over the beneficiaries of the trust. California Civil Code Section 2235; Volume 4, Summary of California Law, Witkin, Page 2929. The fact that T. Jack Foster & Sons were fiduciaries for the Estero District is shown by the words of their attorney in these proceedings: "there is no question but that Mr. Foster or the Foster defendants control the District, in the same sense that the majority stockholder in a corporation controls a corporation. . ." (Cooper vs. Foster, Reporter's Transcript, Page 67 lines 7-14). Persons exercising a controlling interest in a corporation have a fiduciary duty regarding the corporation. Volume 3, Summary of California Law, Witkin, Pages 2390-2391.

Here T. Jack Foster & Sons had control over the Estero District because of the the property qualification for voting, and they caused the Estero District to disburse to themselves millions of dollars and controlled the manner in which it disbursed many other millions. This included causing the District to improve the lands of T. Jack Foster & Sons and then causing the District to purchase those lands at values based on the improved condition without any reimbursement or allow-

ance to the District for the improvement expense. The Estero Act provides no method for control over this private operation of a public district, and the Courts of the State of California have refused to terminate this private use of public powers and public monies and have also refused to compel any accounting for the funds which the land developer has caused the district to disburse to the land developer. Petitioner has been deprived of his property without due process of law because his property interest as a tenant of land within the Estero District (upon a 75 year leasehold) has been and is being charged with increasing public debt which is incurred by a government which has been entirely controlled by interested private persons and is still not a one man one vote representative government. He has no other recourse but to the Courts and This Court is the last tribunal open to him to secure representive government and public disclosure and control of dealings in public money in his local government.

CONCLUSION

This Honorable Court should grant a Writ of Certiorari directed to the Supreme Court of the State of CAlifornia to create representative government and due process of law in the affairs of the Estero Municipal Improvment District.

Respectfully submitted:

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ADVANCE CALIFORNIA REPORTS

CASES DETERMINED IN THE SUPREME COURT

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[S. F. No. 22616. In Bank. Mar. 20, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. LESLIE SALT COMPANY et al., Defendants and Respondents.

[S. F. No. 22617. In Bank. Mar. 20, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. T. JACK FOSTER et al., Defendants and Respondents.

(Consolidated Appeals.)

[On hearing after decision by the Court of Appeal, First Appellate District, Division Four, Civ. Nos. 24800, 24801 (263 A.C.A. 632, 69 Cal.Rptr. 882) affirming the judgment of the superior court. Affirmed.]

[1a, 1b] **Municipal Corporations—Public Improvements—Improvement District.**—Once the existence of a municipal improvement district, created by an act not patently unconstitutional, is established, either de facto or de jure, a private person may not contest the validity of proceedings leading to its formation.

[2] **Corporations—Corporate Existence—De Facto Existence—Requisites.**—The elements prerequisite to de facto corporate status are: a charter or general law under which a corporation may be formed; a good faith attempted compliance with the

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[2] See Cal.Jur.2d, Corporations, § 46 et seq; Am.Jur.2d, Corporations, § 49 et seq.

McK. Dig. References: [1, 4] Municipal Corporations, § 402; [2] Corporations, § 51; [3] Corporations, § 61; [5] Judgments, § 10; [6] Municipal Corporations, § 103; [7] Municipal Corporations, § 479; [8] Pleading, § 53(2); [9] Fraud and Deceit, § 37(2); [10] Pleading, § 103(2); [11] Pleading, § 101(2); [12] Appeal and Error, § 967; [13] Municipal Corporations, § 471; [14] Appeal and Error, § 1230(2).

statues; colorable compliance with statutory requirements; and an assumption of the corporate powers.

[3] **Id.—Corporate Existence—Pleading—De Facto Existence.**—Absent an allegation that a municipal improvement district has not satisfied all the requirements prerequisite to de facto corporate status, it would, for the purpose of the pleading, at least be a corporation de facto.

[4] **Municipal Corporations—Public Improvements—Improvement Districts—Validity.**—A prior validation judgment purporting to establish the constitutionality of the "Estero Act" (Stat. 1961, 1st Ex. Sess., 1960, Ch. 82, p. 459), creating the Estero Improvement District and the validity of the district's bonds, rendered in an uncontested *in rem* proceeding, establishes that the district's existence is not subject to attack in an action attacking the manner in which municipal improvements and services were financed by the district, of which plaintiff is a taxpayer.

[5] **Judgments — Declaratory Judgments — Constitutionality of Statutes.**—Declaratory relief was not available to a party to attack the existence of a municipal corporation on the ground that the statute creating it was unconstitutional, where such party could not have mantained a quo warranto action in his own name.

[6] **Municipal Corporations — Powers — Reclamation of Private Property.**—The reclamation of private lands which are not all swamp and overflowed lands may be a valid public purpose; and the language of a statute creating a public improvement district authorizing reclamation of submerged or other lands which speaks of "watering or dewatering" but does not specifically mention filling, does not suggest that filling an area described as "dry private land" could never come within the scope of "watering or dewatering," where it was conceivable that lands not actually submerged might be in need of reclamation by means of "watering or dewatering."

[7] **Id.—Actions—Rights and Remedies of Taxpayers—Recovery of Illegal Expenditures.**—A general demurrer was correctly sustained as to an attempt to allege a taxpayer's cause of action to recover sums of an improvement district allegedly applied to private purposes where the complaint did not allege any specific manner in which public moneys of the district had been applied to private purposes, and went no further than to hint at a general subject matter as to which plaintiff felt aggrieved, and where, if all the allegations had been accepted as true, the court would have been unable to deter-

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[5] See **Cal.Jur.2d**, Declaratory Relief, § 60; **Am.Jur.2d**, Declaratory Judgments, § 25.

mine whether plaintiff was entitled to any recovery in behalf of the district.

[8] **Pleading—Complaint—Particular Averments—Right of Plaintiff.**—A complaint hinting at sinister activities on the part of defendant did not state a cause of action where there was no allegation of anything unlawful or illegal in the activities complained of.

[9] **Fraud—Actions—Pleading—Allegation of Facts.**—Fraud is never presumed; facts constituting fraud must be specifically pleaded; the court must be able to determine from the complaint that a prima facie case is alleged; thus a complaint failed to state a cause of action where it neglected to set forth any specific facts which would establish that an agent of defendants acted fraudulently.

[10] **Pleading—Demurrer to Complaint—Amendment After Demurrer Sustained—Discretion of Court.**—Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment.

[11] **Id. — Demurrer to Complaint — Determination — Complaint Containing One or More Good Counts.**—If one count of a complaint does state a cause of action, it is an abuse of discretion to sustain a general demurrer as to that count.

[12] **Appeal — Review—Judgment on Demurrer — Amendment After Demurrer Sustained.**—On appeal from a judgment sustaining a general demurrer to a complaint without leave to amend, the burden is on the plaintiff to demonstrate that the trial court abused its discretion; plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading; and plaintiff failed to sustain such burden on appeal where he made no attempt to demonstrate to the appellate court how he could amend his complaint to state a cause of action and, though he insinuated multiple wrongs by defendants, never pointed out in what manner the insinuations could be combined to state a cause of action.

[13] **Municipal Corporations—Actions—Rights and Remedies of Taxpayers—Constitutional Questions.**—Assuming that the Estero Municipal Improvement District exercises general governmental powers within the purview of *Avery* v. *Midland County*, 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114], that equal protection demands equal apportionment of constituencies in units of local government having general governmental power, in a taxpayer's action attacking the financing of municipal

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[10] See **Cal.Jur.2d**, Pleading, § 167 et seq; **Am.Jur.**, Pleading (1st ed § 249).

improvements and services by the district in which plaintiff made some attempts to raise issues regarding district elections, no occasion was shown for interference by the court with the programming spelled out by the Legislature whereby it recognized that, as the character of the district gradually changed from uninhabited to that of an area with substantial members of resident registered voters, it was appropriate that voting power likewise gradually shift, and provided for gradual transfer of control from owners to resident voters which will be completely accomplished by the close of 1971.

[14] **Appeal—Review—Questions of Law and Fact—Taking Evidence.**—It is not a function of an order under Cal. Rules of Court, Rule 23, subd. (b), to afford a party the facilities of an appellate court for exploratory investigation to try to develop facts sufficient to enable him to state a cause of action.

APPEALS from judgments of the Superior Court of San Mateo County. James T. O'Keefe, Judge. Affirmed.

Actions by taxpayers attacking the manner in which municipal improvements and services are to be financed by a municipal improvement district. Judgments of dismissal after demurrers to complaints sustained without leave to amend affirmed.

Funsten & Caldwell and James W. Funsten for Plaintiffs and Appellants.

Chickering & Gregory, W. Burleigh Pattee, William E. Trautman, Long & Levit, Bert W. Levit, Gerald Z. Marer, Victor B. Levit, Wilson, Jones, Morton & Lynch and John E. Lynch for Defendants and Respondents.

BURKE, J.—In this controversy over the establishment and operation of a special improvement district, a hearing was granted by this court, after decision by the Court of Appeal, First Appellate District, Division Four, for the purpose of giving further study to the problems presented. After such study we have concluded that the opinion of the Court of Appeal, prepared by Justice Christian, correctly treats and disposes of the issues involved, and with certain further comments pertinent to contentions urged, it is adopted as and for the opinion of this court. Such opinion (with appropriate deletions and additions as indicated) is as follows:[1]

[1]Brackets together, in this manner [ ], are used to indicate deletions from the opinion of the Court of Appeal; brackets enclosing material

Plaintiff Walter S. Cooper appeals from judgments of dismissal[2] which followed the sustaining of general demurrers without leave to amend in an action attacking the manner in which respondents have caused municipal improvements and services to be financed by the Estero Municipal Improvement District, of which appellant is a taxpayer.

The district was established by special act [Estero Act] of the Legislature. (Stats. 1961, 1st Ex. Sess. 1960, ch. 82, p. 459.) The act prescribed the boundaries, organization and powers of the district, as well as methods for its operation, management, financing, change of boundaries, and dissolution. Provision is made in section 121 of the act for an in rem proceeding to establish the validity of "the creation of the district and any annexations thereto" or to determine its right to issue bonds.

A judgment purporting to establish the constitutionality of the act creating the district and the validity of the district's bonds was rendered in a noncontested *in rem* proceeding in the Superior Court of San Mateo County on July 20, 1961.

The statute recited that "The land in the district is not owned by residents. The owners are the ones primarily concerned with the district and the ones who will be supporting the district. The owners should therefore hold the voting power." (§ 215, subd. (f).) Thus it was provided that voting was to be upon the basis of assessed valuation of land [ ] [§§ 17, 19, 20, 64], and that the district was to be governed by three directors (§ 26) who must be "owners, or officers or legal representatives of owners" (§ 28). The statute places a broad array of municipal functions within the powers of the district, including provision of street lighting, sewerage, storm drainage, garbage service, water service, parks and playgrounds, and reclamation of [ ] land (§ 77). The dis-

(other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted. (*Simmons* v. *Civil Service Emp. Ins. Co.* (1962) 57 Cal.2d 381, 383, fn. 1 [19 Cal.Rptr. 662, 369 P.2d 262]; *Eye Dog Foundation* v. *State Board of Guide Dogs for the Blind* (1967) 67 Cal.2d 536, 540, fn. 1 [63 Cal.Rptr. 21, 432 P.2d 717]; *Smith* v. *Anderson* (1967) 67 Cal.2d 635, 637, fn. 1 [63 Cal.Rptr. 391, 433 P.2d 183]; *McDonnell Douglas Corp.* v. *Franchise Tax Board* (1968) [a]69 Cal.2d ——, ——, fn. 1 [72 Cal.Rptr. 465, 446 P.2d 313].)

[2]Two judgments were entered on separate dates as to two groups of defendants. Plaintiff appeals from both judgments; the issues are identical and the appeals have been consolidated.

[a]Advance Report Citation: 69 A.C. 524, 526, fn. 1.

trict is also empowered to construct small craft harbors (§ 78), provide fire protection (§ 79), and "make and enforce all necessary and proper regulations, not in conflict with the laws of this State, for the . . . supplying of . . . police protection service. A violation of a regulation of the district is a misdemeanor punishable as such." (§ 97.) The statute includes elaborate financial provisions, including authorization for the directors to issue general obligation bonds (§§ 105-123) and other types of securities to raise money for development of the raw land included within the district so that the owners thereof, who absolutely control the operations of the district,[3] can cause the various improvements to be made which are necessary to make the land fit for marketing as a residential tract. (See Willoughby, *The Quiet Alliance*, (1965) 38 So.Cal.L.Rev. 72, for a review of several comparable special statutes under which governmental powers have been made serviceable to land developers.)

Appellant's complaint, alleging four causes of action upon various theories, was amended twice before a general demurrer was sustained without leave to amend. Because the four causes of action contain overlapping allegations, and the dismissal was upon a general rather than a special demurrer, we shall analyze as a whole all of the factual allegations of the complaint to determine (1) whether any cause of action was stated, and (2) whether the trial court committed an abuse of discretion in cutting off further amendment.

There is no allegation that the formation and operation of the district failed to conform to the provisions of the Estero Act; rather it is charged that the act itself is void in that it purports to create a corporation for municipal purposes by special act of the Legislature in violation of article XI, section 6, of the California Constitution.[4]

[1a] Respondents contend that Code of Civil Procedure section 803 precludes appellant from contesting the validity

[3] After the dismissal of this action the act was amended [§§ 26, 28], to enlarge the board of directors to five members, of which two represent landowners, two represent residents, and one is a "public member" appointed by the county board of supervisors. After 1969, the "public member" will also be elected by the residents of the district, [and after 1971 the two directors now representing landowners will likewise be elected by the residents]. (Stats. 1967, ch. 1511, §§ 3, 5.)

[4] Article XI, section 6: "Corporations for municipal purposes shall not be created by special laws; but the Legislature shall, by general laws, provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, . . ."

of proceedings leading to the formation of the district. Section 803 provides:

"An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure of de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. And the attorney general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor."

In *San Ysidro Irr. Dist.* v. *Superior Court* (1961) 56 Cal.2d 708 [16 Cal.Rptr. 609, 365 P.2d 753], [ ] [this] court held that, absent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy in cases in which it is available. Therefore, it is the exclusive remedy for testing the legality of the existence of an irrigation district. As those districts are delegated agencies of the state government their existence should not be subject to attack at the caprice of private interests, but should be open to question only in a direct proceeding controlled by an officer charged with protecting the public interest. The court therefore held that the superior court would not have jurisdiction of an action challenging the lawful existence of a special district unless brought by the Attorney General.

In *City of San Diego* v. *Otay Municipal Water Dist.* (1962) 200 Cal.App.2d 672 [19 Cal.Rptr. 595], the city brought an action to enjoin the [ ] [furnishing of water to inhabitants of an improvement district]. Three landowners intervened seeking a determination of the validity of proceedings resulting in the formation of the district. The court held [p. 681] that the interveners had no authority to bring the action to annul the existence of the district on the grounds that it was invalidly formed or that the statute under which it was formed was unconstitutional. Such a remedy is not available to a taxpayer; it is within the exclusive province of the Attorney General through a quo warranto action. (Accord *Wilson* v. *City of San Bernardino* (1960) 186 Cal.App.2d 603 [9 Cal. Rptr. 431]; 41 Cal.Jur.2d, Quo Warranto, § 5, p. 614; 74 C.J.S., Quo Warranto, § 5, p. 183; 74 C.J.S., Quo Warranto, § 4, 179-181.)

Appellant contends that quo warranto is not the exclusive remedy here because the Estero district is neither de facto nor de jure a corporation, citing *Brandenstein* v. *Hoke* (1894) 101 Cal. 131 [35 P. 562]. There the court found patently unconstitutional, a statute under which a levee district was formed [and denied recovery to plaintiff bondholder who sought to compel defendant board of supervisors to levy and collect a tax to pay the bonds]. The court considered that because there was no valid statute under which the purported corporation could have been created, no de facto corporation could exist. But later cases have held that without regard to the claimed unconstitutionality of any statute, it is only where proceedings to create a district have not been fully completed that a private citizen can question their validity. (*Alden* v. *Superior Court* (1963) 212 Cal.App.2d 764, 769-770 [28 Cal.Rptr. 387]; *City of Colton* v. *City of Rialto* (1964) 230 Cal.App.2d 174 [40 Cal.Rptr. 766]; *Hazelton* v. *City of San Diego* (1960) 183 Cal.App.2d 131, [135] [6 Cal.Rptr. 723]; [see also *Lorty* v. *Anderson* (1963) 60 Cal.2d 312, 316 [33 Cal.Rptr. 97, 384 P.2d 417]].) **[2]** The following elements are prerequiste to de facto corporate status: (1) there must be a charter or general law under which a corporation may be formed; (2) there must be a good faith attempted compliance with the statute; (3) there must be a colorable compliance with the statutory requirements; and (4) there must be an assumption of the corporate powers. (1 McQuillan, Municipal Corporations, § 3.48; *City of Colton* v. *City of Rialto, supra,* 230 Cal.App.2d 174, 182.) **[3]** There is no allegation that the Estero District has not satisfied all these requirements; thus it would at least be a corporation de facto. **[1b]** Moreover, since the act is not patently unconstitutional, the rule of *Brandenstein* v. *Hoke, supra,* does not apply. Once the district's existence is established, either de facto or de jure, it follows that a private person may not contest the validity of proceedings leading to its formation. (*Hazelton* v. *City of San Diego, supra,* 183 Cal.App.2d 131, 135.) **[4]** In the present case the prior validation judgment declared that the district was validly created. [ ] [The district's existence is thus not subject to the attack here attempted.]

[5] Appellant advances a subsidiary contention that he ought to be allowed to attack the constitutionality of the Estero Act because, in one of the causes of action, he seeks a judicial declaration that the statute is unconstitutional. But in *San Ysidro Irr. Dist.* v. *Superior Court, supra,* 56 Cal.2d

708, 715, it was held that because the declaratory judgment law was not designed to undermine the policy of the quo warranto statute, the existence of municipal corporations is not open to attack by private individuals. "The existing authorities in California support the view that declaratory relief would not be available to a party in these circumstances which could not maintain a quo warranto action in its own name." (56 Cal.2d at p. 715.)

The complaint alleges that $30,000,000 of the district's funds was "spent to improve and make saleable the real property of [the Foster defendants] under the claim that said expenditure is authorized as reclamation. . . ." In his capacity as a district taxpayer appellant prayed for a judgment requiring restoration of that amount to the district. **[6]** Appellant contends here that the district is not empowered to fill dry land. It is true that section 77 of the act, authorizing reclamation of "submerged or other land" speaks of "watering or dewatering" and does not specifically mention filling. It is also true that section 78, which authorizes reclamation by grading, excavation and filling, refers only to "small craft harbor purposes." Appellant seems to contend that filling of an area described only as "dry private land" could never come within the scope of "watering or dewatering." The language of the statute does not suggest that conclusion; it is conceivable that land not actually submerged might be in need of reclamation by means of "watering or dewatering." The reclamation of private lands which are not all swamp and overflowed lands may be a valid public purpose. (*Islais Creek Rec. Dist.* v. *All Persons* (1927) 200 Cal. 277, 283 [252 P. 1043].) **[7]** Moreover, the complaint alleges that the work done was not reclamation at all because it was "for [other] improvement of dry private land of said defendants." That language is so broad as to bring into play the whole array of services mentioned in section 77 (e.g., sewerage, storm drainage, and "distribution of water for public and private purposes") which may be proper functions of a governmental entity even though private property is incidentally benefited. Appellant has never alleged any specific manner in which public monies of the district have been applied to private purposes. The allegations we have reviewed go no further than to hint at a general subject matter as to which plaintiff feels aggrieved; if all those allegations were accepted as true the court would have been unable to determine whether plaintiff was entitled to any recovery whatever in behalf of the

district. The general demurrer was therefore correctly sustained as to the attempt to allege a taxpayer's cause of action.

[8] The complaint then sets forth miscellaneous general allegations hinting at sinister activities on the part of certain of the respondents:

(a) It is alleged that the Foster respondents "have secured for themselves the power to control and administer the bookkeeping of said district for a compensation. . . ."

(b) It is alleged that the Foster respondents have, by virtue of their control and domination of the district, "obtained great private monetary advantage. . . ."

(c) It is alleged that Innes, a Foster employee and a director of the district, caused the Associated Dredging Company to submit statements to the district pursuant to which two district checks totaling $860,218.05 were issued and delivered to Associated with the understanding that they would be indorsed to respondent Midwest Dredging Corporation, a Foster subsidiary. It is alleged that Midwest received a further $1,667,183.80 upon claims it presented directly to the district.

None of these recitals states a cause of action. There is no allegation that there was anything unlawful about the manner of contracting for bookkeeping services for the district; neither is any showing of illegality alleged with regard to the payments to Associated Dredging and Midwest Dredging. **[9]** It is possible that appellant intended to allege fraudulent misappropriations of district funds, but fraud is never presumed—facts constituting fraud must be specifically pleaded. (*Gautier* v. *General Tel. Co.* (1965) 234 Cal.App.2d 302, 308 [44 Cal.Rptr. 404].) The court must be able to determine from the complaint that a prima facie case is alleged. (Chadbourne, Grossman, Van Alstyne, 2 California Pleading, § 982.) Here the complaint neglects to set forth any specific facts which would establish that Innes acted fraudulently. For example, appellant does not allege that the work was poorly done or not done at all. He does not allege facts to show that the $860,218.05 was a higher amount than a contract called for. Appellant does not allege that there was anything fraudulent about the endorsement of the checks by Associated to the Foster subsidiary. Possibly the two firms were joint venturers in the reclamation work.

[10] Generally it is an abuse of discretion to sustain a demurrer without leave to amend if there is any reasonable possibility that the defect can be cured by amendment. (*Tem-*

escal Water Co. v. *Department of Public Works* (1955) 44 Cal.2d 90, 107 [280 P.2d 1].) **[11]** If one count of a complaint does state a cause of action, it is an abuse of discretion to sustain the demurrer as to that count. (*Western Title Ins. etc. Co.* v. *Bartolacelli* (1954) 124 Cal.App.2d 690, 694 [269 P.2d 165].) **[12]** However, the burden is on the plaintiff to demonstrate that the trial court abused its discretion. (*Filice* v. *Boccardo* (1962) 210 Cal.App.2d 843, 847 [26 Cal.Rptr. 789]; *Starbird* v. *Lane* (1962) 203 Cal.App.2d 247, 262 [21 Cal.Rptr. 280]; *Schultz* v. *Steinberg* (1960) 182 Cal.App.2d 134, 140 [5 Cal.Rptr. 890].) Plaintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading. (*Saint* v. *Saint* (1932) 120 Cal.App. 15, 23-24 [7 P.2d 374].) Here appellant has never advanced, either in the trial court or before us, any effective allegation which he could now make if further amendment to the complaint were to be permitted. Although he insinuates multiple wrongs by respondents, he never points out in what manner those insinuations could be combined to state a cause of action. (See *Schultz* v. *Steinberg*, *supra*, at p. 141.)

[13] Appellant also contends that reversal is required by the recent holding of the United States Supreme Court in *Avery* v. *Midland County* (1968) 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114] that equal protection demands equal apportionment of constituencies in units of local government having general governmental powers. The complaint did make some attempt to raise issues regarding district elections. It alleged: "Said act and the purported district are in conflict with the Constitution of the United States of America in that, among other things, the power to vote in said district is divided according to assessed valuation rather than equally among persons." [ ] [However, even if it be assumed without deciding that defendant district exercises general governmental powers within the purview of *Avery* (see also *Thompson* v. *Board of Directors* (1967) 247 Cal.App. 2d 587, 590-592 [55 Cal.Rptr. 689]), the Legislature has already made provision for transfer of control from the owners to the residents. As stated (*ante*, fn. 3), by amendment of the Estero Act (Stats. 1967, ch. 1511) the governing board was increased to five members commencing in December 1967 (§ 26), two of whom are required to be and to be elected by registered voters resident within the district (§ 28). After December 1969 the member now appointed by the county board of supervisors

will also be elected by resident registered voters, and after December 1971 the offices of the present two landowner-directors will similarly be filled by vote of residents. (§ 28.)

[It appears that at the time the district was created by the Legislature in 1960 it comprised some 418 uninhabited acres under a single ownership, that thereafter it annexed adjacent territory (§ 205) so that it now totals some 2,600 acres, and that as improvement and development have proceeded the district has acquired residents. The statute declares the desirability that upon creation of the district the owners hold the voting power, as they were the persons primarily concerned with the district and who would be supporting it. (§ 215.)[5] However, the Legislature has recognized that as the character of the district gradually changes from uninhabited to that of an area with substantial members of resident registered voters it is appropriate that voting power likewise gradually shift. Since the transfer of control from owners to resident voters will be completely accomplished by the close of 1971, no occasion is shown for interference by this court with the programming spelled out by the Legislature. (See *Silver* v. *Brown* (1965) 63 Cal.2d 270, 274-275 [46 Cal.Rptr. 308, 405 P.2d 132]; *Miller* v. *Board of Supervisors* (1965) 63 Cal.2d 343 [46 Cal.Rptr. 617, 405 P.2d 857].)]

[14] At oral argument [before the Court of Appeal, when this cause was pending before that court] appellant moved, pursuant to rule 23, subdivision (b), California Rules of Court, for an "Order Directing Taking of Evidence on Appeal" to assist [ ] [The] court in determining whether the superior court correctly ordered the amended complaint dismissed as sham[6] and "whether there are additional facts not referred to in the complaint herein, which are within the subject matter of the complaint and as to which appellants should be allowed an opportunity to plead." We do not con-

[5]Section 215 of the statute further declares, among other things, the purpose of enabling improvement of the area; that the area was without sewage facilities, adequate water supply, or small craft harbor facilities, all of which it urgently needed; that the area is of strategic importance during times of war or threatened war, and that influx of military men and their families during such times greatly increases the necessity of providing facilities.]

[6]The Foster respondents and some of the other respondents moved to strike the complaint as amended, on the ground that it was "sham, vexatious, scandalous, abusive, disrespectful, frivolous," etc. The order granting the motion to strike was concurrent with the order sustaining the demurrer. The judgment of dismissal is adequately supported by the ruling upon the demurrer; therefore we have not considered the propriety of the motion to strike.

sider it a function of an order under rule 23, subdivision (b), to afford a party the facilities of the appellate court for exploratory investigation to try to develop facts sufficient to enable him to state a cause of action.

The judgments are affirmed; the motion to take evidence is denied.

Traynor, C. J., McComb, J., and Tobriner, J., concurred.

MOSK, J.—I concur in part and dissent in part.

On the basis of the complaints in these proceedings and in the companion case, there arise suspicions that all is not well with the management of the Estero community. But suspicions, however strong, are inadequate for pleading purposes. Thus I concur in much of the majority opinion.

Many of the problems giving rise to plaintiff's dissatisfaction would dissolve if the people of the district had been, as everyone should be in a democratic society, the masters of their own destiny. Here the effective political and economic power rests not with the residents of the district, but with a regency. Like a vicarious government during a monarch's childhood, this district is ruled as if the people required protective guidance during their minority. However tolerable in another milieu, such paternalism is undesirable and invalid in this year 1969.

Therefore I dissent from that portion of the majority opinion which holds that because "the transfer of control from owners to resident voters will be completely accomplished by 1971 no occasion is shown for interference by this court with the programming spelled out by the Legislature."

In my view, the Estero Act, as it presently exists, unquestionably violates the precepts laid down in *Avery* v. *Midland County* (1968) 390 U.S. 474 [20 L.Ed.2d 45, 88 S.Ct. 1114], and the majority's holding that compliance with those constitutional principles may be deferred until a future date cannot be justified. I would hold that the Supreme Court one-man, one-vote command is not satisfied by the one-man, three-fifths-of-a-vote practice now prevailing in the Estero community. (Maj. Opn. fn. 3.)

In *Avery* the Supreme Court held that the one-man one-vote principle enunciated in *Reynolds* v. *Sims* (1964) 377 U.S. 533 [12 L.Ed.2d 506, 84 S.Ct. 1362], is applicable to districts of local government and that the Constitution permits no substantial variation from equal population in establishing units of local agencies having general governmental powers. The

Midland County Commissioners Court, the elective body involved in *Avery*, was empowered to establish a courthouse and jail, appoint numerous minor officials, fill vacancies in the county offices, let contracts in the name of the county, build roads and bridges, administer the county's public welfare services, perform numerous duties in regard to elections, set the county tax rate, issue bonds, adopt a budget, serve as a board of equalization, and build and operate various public facilities.

The local governing body in *Avery* had the "power to make a large number of decisions having a broad range of impacts on all the citizens of the county" and to make "long-term judgments" affecting the future development and the present needs of the county. The opinion states, "Were the Commissioners Court a special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such bodies may be apportioned in ways which give greater influence to the citizens most affected by the organizations' functions. That question, however, is not presented by this case, for . . . the relevant fact is that the powers of the Commissioners Court include the authority to make a substantial number of decisions that affect all citizens" of the county. Similarly, in *Pierce* v. *Village of Ossining* (S.D.N.Y. 1968) 292 F.Supp. 113, a statute limiting the right to vote in local elections to property owners was held to constitute a denial of equal protection of the laws.

In California we have applied the one-man, one-vote principle of *Reynolds* v. *Sims* (1964) *supra*, 377 U.S. 533, to elections for county boards of supervisors which serve local legislative and administrative functions. (*Miller* v. *Board of Supervisors* (1965) 63 Cal.2d 343, 348 [46 Cal.Rptr. 617, 405 P.2d 857].)

While the present case does not involve the problem of malapportionment of elective districts but discrimination between voters who own and those who do not own real property within the district, as well as between small and large landowners, it is inescapable from the holding of *Avery* that if the district's board may exercise general governmental powers over the residents of the district, the voters therein must be accorded equal voting rights on a one-man, one-vote basis, without regard to whether or not they own property within the district or the amount thereof. (See *Thompson* v. *Board of*

Directors (1967) 247 Cal.App.2d 587, 590-592 [55 Cal.Rptr. 689].)

An analysis of the terms of the Estero Act establishes that the district is not a "special purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents." Indeed it is difficult to contemplate a broader spectrum of general governmental functions than those bestowed upon the Estero community. The district is empowered to acquire, construct and maintain facilities for street lighting, collection and disposal of sewage, production and distribution of water, parks, playgrounds and drainage works, and may reclaim submerged or other land by watering or dewatering (Estero Act, § 77). It may acquire or construct a private small craft harbor and utilities useful to its operation (§ 78). It may also operate and equip fire and police departments (§ 79), construct gas, telephone and electrical facilities (§ 79a), hold or dispose of property within or without the district (§ 80), and exercise the right of eminent domain for the condemnation of private property for public use in the same manner as the legislative body of a city (§ 81). It may make such contracts as appear necessary or proper (§ 83) and make and enforce regulations necessary to the exercise of the functions given it by the act. A violation of these regulations constitutes a misdemeanor (§ 97).

The governing board has very broad financial powers. It may borrow money (§ 85), issue general obligation bonds (§ 105 et seq.) and revenue bones (§ 135), and cause special assessments to be levied and issue bonds to represent unpaid assessments (§ 93). Taxes to pay the principal and interest on the bonds and to defray expenses incidental to the district's powers are levied, under the act, on the real and personal property in the district (§ 160 et seq.).

This comprehensive range of authority is in some respects more embracive than that accorded the Commissioners Court in *Avery* and most, if not all, of the powers affect all residents of the district alike, without regard to the amount, if any, of real property they own in the district. Under these circumstances there seems little doubt that plaintiff and other residents of the district are deprived of equal protection of the laws by the requirement that a certain number of members of the governing board be elected only by landowners and that voting power among landowners should be divided according to assessed valuation. As stated in *Harper* v. *Virginia Board*

of Elections (1965) 383 U.S. 663, 666 [16 L.Ed.2d 169, 172, 88 S.Ct. 1079]: ". . . a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter . . . an electoral standard. Voter qualifications have no relation to wealth. . . ."

The majority holds that even if present methods of voting are of dubious validity, the Legislature has provided for the gradual transfer of control of the district to the residents by elections to be held in November 1971, and we are not justified in tampering with this scheme.[1] The only authority cited for this proposition is *Silver* v. *Brown* (1965) 63 Cal.2d 270, 274-275 [46 Cal.Rptr. 308, 405 P.2d 132], and *Miller* v. *Board of Supervisors* (1965) 63 Cal.2d 343, 350 [46 Cal.Rptr. 617, 405 P.2d 857]. Both these cases, decided in September 1965, not only fail to support the majority's holding but they teach us that dilatoriness and deferred reapportionment plans are unacceptable. In *Silver* we held that although the California Senate and Assembly should be accorded an opportunity to reapportion themselves since they had previously failed to agree upon a plan and since a delay until the next regular session was not justified, this court would itself promulgate a reapportionment plan for the forthcoming election unless a special session of the Legislature passed a constitutionally adequate reapportionment plan in time for that election. In *Miller* we ordered invalidly apportioned supervisorial districts to be reapportioned by the Board of Supervisors of Santa Clara County within 90 days so that the next election would be based upon the newly apportioned districts. In neither *Silver* nor *Miller* would this court tolerate procrastination; in both instances we insisted upon one man, one vote at the immediately forthcoming election, although the factors involved in reapportionment were complicated and politically volatile. Moreover, in *Silver* respondents urged cogent reasons for delaying reapportionment, i.e., that compliance with certain provisions of the Elections Code was difficult because of the time factors involved, but we resolutely held nevertheless that a delay was not justified. Finally, in both *Silver* and

[1]This is somewhat reminiscent of the noblesse oblige evidenced by the court in *People* v. *Sacramento Drainage Dist.* (1909) 155 Cal. 373 [103 P. 207], when it approved creation of a governmental agency to carry out a single purpose, and said (at p. 382): "It is in accord with the progressive spirit of our government to give to the people, or any part of them, the largest possible control in matters peculiarly affecting them and their interests. It is a concession to this spirit, and not the compulsion of the law, which prompts the legislature to give the landowners so large a voice in the management of these affairs."

Miller no constitutional reapportionment plans were then in existence, and this court, although reluctant to undertake formulation of a program, was willing to do so if necessary to preserve the constitutional rights of the voters at the next election.

Here we are presented with a much stronger case for immediate implementation of the voting rights of citizens than in either *Silver* or *Miller*, for, by contrast, no new reapportionment plan need be designed. The Legislature itself has passed a complete scheme to effectuate the voting rights of the district's residents down to the details regarding the manner in which both regular and special elections should be conducted, but has provided that the statute, passed in 1967, should not be fully implemented until the elections to be held in November 1971. (Stats. 1967, ch. 1511.) There are no complicated policy questions here relating to whether the Legislature should be given an initial opportunity to carry out the constitutional mandate before this court acts. The only reason advanced by the majority for holding that the district's residents are not entitled to an equal vote until 1971 is that there were no residents in the district when it was originally formed and that the Legislature has made a determination that when substantial numbers of voters move into the district the voting power should gradually shift to the residents.

The flaw in the program, unanswered by the majority, is the lack of justification for waiting until November 1971, if there are a substantial number of resident voters long before that date. The uncontroverted fact is that there are now more than 8,000 persons residing in the district and the steady influx indicates there will be many more prior to the time an election is held in November 1971. No one can deny that there are a substantial number of registered voters among the residents. It seems hardly necessary to note parenthetically that if the legislative bodies involved in the *Silver* and *Miller* cases had passed valid reapportionment measures but had delayed their effectiveness for four years because it was their judgment that the equal voting rights of citizens should be implemented gradually, this court would not have conntenanced such a dilatory arrangement.

Indeed, a recent case involved just that situation. In *Petuskey* v. *Rampton* (1965) 243 F.Supp. 365, 369-374, the Utah Legislature was reapportioned by an act, passed in 1965, but not to be effective until 1969. The court held this provision to be in violation of the federal Constitution and ordered that the reapportionment become effective at the next election at

which it was mechanically possible to put the plan into operation.

Silver and *Miller* are not the only cases which have recognized the urgency of prompt action in order to assure that voters are not deprived of their rights one day longer than necessary. *Reynolds* v. *Sims* (1964) *supra*, 377 U.S. 533, states (at p. 585 [12 L.Ed.2d at p. 541]) that ". . . once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."[2] A number of commentators have also emphasized the necessity for promptness because "every day that a legislature elected under an invalidated system is allowed to sit results in the perpetuation of the wrong for which a remedy is sought." (*The Case for District Court Management of the Reapportionment Process*, 114 U.Pa.L.Rev. 504, 510; McKay, Reapportionment (1965) 161-162.) Many courts have taken heroic measures in order to avoid an undue postponement of relief. For example, state constitutional measures setting forth "time lock" provisions have been bypassed (*Buckley* v. *Hoff* (D.Vt. 1964) 234 F.Supp. 191, 198), deadlines have been set, such as those in *Silver* and *Miller*, and even where practical considerations have called for permitting elections to be conducted on the basis of unvalidly apportioned districts some courts have reduced the terms of the representatives elected under the unconstitutional system. (*Hughes* v. *WMCA, Inc.* (1965) 379 U.S. 694, 695 [13 L.Ed.2d 698, 699, 85 S.Ct. 713]; for a summary of some remedial measures adopted by the courts see *The Case for District Court Management of the Reapportionment Process, supra*, 114 U.Pa.L.Rev. 504.)

In the present case no obstacles to the immediate conduct of elections on a one-man, one-vote basis exist, and only the statutory postponement of the exercise of those rights until 1971 impedes implementation. This action was filed in 1966, before the Legislature had made any provisions for elected represen-

[2]This injunction is qualified by the further statement that "in awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws" and that "a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree." (377 U.S. at p. 585.) No claim is made that any of the foregoing factors justifying a delay are present here.

tation of nonlandowners on the board. Three years have elapsed since that time and almost three more years will pass before the composition of the board complies with constitutional mandates. To wholly or partially deprive more than 8,000 residents of their constitutional right to an equal vote is unjust. That the injustice is to be cured in the future makes it no less unjust today.

Peters, J., and Sullivan, J., concurred.

[Civ. No. 22619. In Bank. Mar. 20, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. ESTERO MUNICIPAL IMPROVEMENT DISTRICT et al., Defendants and Respondents; T. JACK FOSTER et al., Interveners and Respondents.

[1] **Mandamus—Pleading—Amendment.**—In a taxpayer's mandamus proceeding to test the activities of the Estero Municipal Improvment District, its directors, and certain landowner developers of the district, in which petitioner filed a cross-complaint couched in 10 causes of action to a complaint in intervention filed in behalf of 2,000 residents of the district, designating as defendants the district, its directors, the landowner developers, the residents, and others, the trial court properly denied plaintiff petitioner's motion to amend his second amended mandamus petition so as to substitute the cross-complaint therefor, where the latter appeared to be plaintiff's seventh attempt to state a cause of action on substantially similar grounds.

[2] **Id.—Conditions Affecting Issuance—Acts and Duties Enforceable.**—Mandamus, being available only to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station (Code Civ. Proc., § 1085), was not a proper vehicle for redress of asserted taxpayer grievances arising from transactions between the Estero Municipal Improvement District and its developer landowners, and seeking an accounting for benefits received by the

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[2] See **Cal.Jur.2d**, Mandamus, § 2 et seq; **Am.Jur.**, Mandamus, (1st ed § 54 et seq).

McK. Dig. References: [1] Mandamus, § 95; [2, 3] Mandamus, § 6; [4, 5] Mandamus, § 88; [6] Mandamus, § 85(0.5); [7] Mandamus, § 85(2).

latter from the district, where petitioner plaintiff alleged nothing to indicate that the developer landowners had a duty to account to him nor that the district was enjoined by law to cause an investigation to be made of its disbursements to the developer landowners as prayed for alternatively in the petition, and where plaintiff petitioner did not allege that he was suing in behalf of the district or that he made demands upon the district to request an accounting from the developer landowners which was refused.

[3] **Id.—Conditions Affecting Issuance—Acts and Duties Enforceable.**—The remedy of mandate was inappropriate as to a second cause of action set forth in a mandamus petition challenging a certain transaction between the Estero Municipal Improvement District and a dredging company and praying that the district obtain an accounting in connection therewith, where the district had no duty to conduct the proposed investigation and there was no allegation of wrongdoing and no grounds alleged upon which a court might order an accounting.

[4] **Id.—Pleading—Demurrer to Petition.**—The trial court erred in sustaining a general demurrer to a third cause of action set forth in a mandamus petition, based on an asserted violation of the Estero Act, § 193 (Stats. 1963, Ch. 995), providing that if the district board appoint a depositary for its funds it shall appoint a finance officer who must be bonded for at least $250,000, and the allegations of the cause of action appeared sufficient against general demurrer, where the petition alleged that the district had appointed a depositary, that it had an appropriate bond until a certain time, but that plaintiff was informed and believed the district no longer carried a fiduciary bond in compliance with the section, and that the district had refused to inform plaintiff of the terms of any bond it might have, and where, the district in its return replied that a bond existed insuring "all offices and departments" of the district, so that it appeared on the face of the pleadings that the district did not have an individual bond for its finance officer as required by the section but that all of its employees were insured for the required sum in the aggregate.

[5] **Id.—Pleading—Demurrer to Petition.**—In a mandamus proceeding challenging activities of the Estero Municipal Improvement District and its directors, the allegations of a fourth cause of action contained in the petition seeking replacement of moneys transferred from the park fund of the district appeared incomprehensible, and the trial court acted

[4] See **Cal.Jur.2d**, Mandamus, § 64; **Am.Jur.**, Mandamus (1st ed § 362).

properly in sustaining a demurrer thereto, where it was alleged that certain money was transferred from the park fund to a reclamation fund, that the money in the reclamation fund would be used to make interest payments on reclamation bonds, that future interest payments would exceed the reclamation fund so that additional moneys would be removed from other bond funds or transferred to the reclamation fund, and where the broad general allegation that all such activities were in violation of law was merely a conclusion and no facts were alleged justifying the granting of any relief.

[6] **Id.—Petition—Sufficiency.**—In a mandamus proceeding challenging activities of the Estero Municipal Improvement District and its directors, the allegations of a purported fifth cause of action contained in the petition failed to state a cause of action seeking judgment that none of bond sale proceeds be used for payment of interest on prior bonds, where it did not appear that the payment of such interest from bond proceeds was illegal or that the law required that a bond election specifically authorize the use of proceeds for payment of interest, where, according to the Estero Act, §§ 106 and 107 (Stats. 1960, 1st Ex. Sess., Ch. 82), the board may call a bond election by a resolution which may submit to the voters the question of issuing bonds to make all outlays or so many of them as may be selected, and where the cause of action alleged that the board in its resolution stated that a certain amount of current bond sales would be used to pay interests on bonds, and there was no allegation that the provisions of the section were not complied with as to other bond sales mentioned in the cause of action.

[7] **Id.—Pleading—Showing of Right of Petitioner and Power of Duty of Respondent.**—In a mandamus proceeding challenging activities of the Estero Municipal Improvement District, its directors, and certain landowner developers thereof, plaintiff was entitled to no remedy under the nebulous allegations of a purported sixth cause of action seeking to compel the district to obtain a welter of financial details and other information from the landowner developers before expenditure of further funds for their benefit, where plaintiff alleged nothing to indicate any duty on defendants' part resulting from an office, trust, or station, or any act, performance of which by defendants was specially enjoinable by law.

APPEAL from a judgment of the Superior Court of San Mateo County. James T. O'Keefe, Judge. Affirmed in part and reversed in part.

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[7] See **Cal.Jur.2d**, Mandamus, § 61; **Am.Jur.**, Mandamus (1st ed § 344 et seq).

Proceeding in mandamus challenging in six causes of action activities of the Estero Municipal Improvement District, its directors, and landowner developers of the district. Judgment of dismissal after demurrers to second amended petition sustained reversed only as to petition for performance bond and affirmed in all other respects.

Funsten & Caldwell, James W. Funsten and David B. Caldwell for Plaintiff and Appellant.

Wilson, Jones, Morton & Lynch, John E. Lynch and Robert G. Auwbrey for Defendants and Respondents.

Long & Levit, Bert W. Levit and Victor B. Levit for Interveners and Respondents.

BURKE, J.—Plaintiff is a resident and taxpayer in the Estero Municipal Improvement District, which was created by special act of the Legislature in 1960 (hereinafter sometimes called the Estero Act). (Stats. 1960, 1st Ex. Sess., ch. 82.) He appeals from a judgment of dismissal (entered October 31, 1967) which followed the sustaining of general and special demurrers to his second amended petition for mandate. We have concluded that except for the third count of the petition the trial court correctly determined that plaintiff has failed to state a cause of action.

Before discussing the allegations of the petition it is appropriate to clarify the context in which plaintiff has appealed, as the parties disagree as to which of plaintiff's pleadings is the subject of this appeal.

Plaintiff's original petition for mandate alleged that he was suing on behalf of over 100 persons similarly situated, and named as defendants the district and its directors. A complaint in intervention was thereafter filed, with leave of court, by several parties known as the Foster defendants.[1] Plaintiff then filed a first amended petition for writ of mandate, which was followed by a second amended petition. The second amended petition is the only pleading of plaintiff properly before this court and the only defendants are those described above (the district, its directors, and the Foster defendants).

[1]The Foster defendants are T. Jack Foster, his three sons, T. Jack Foster & Sons (a copartnership composed of the individual Fosters), and a corporation whose stock is wholly owned by the individual Fosters.

After plaintiff filed his second amended petition a complaint in intervention was filed by Wayne A. McFadden and the Foster City Community Association on behalf of two thousand residents of Foster City. The association later filed an amended complaint in intervention, to which plaintiff demurred. No ruling on that demurrer appears in the record and there is no justiciable issue, therefore, regarding the first amended complaint in intervention filed on behalf of the Foster City Community Association. The association has not filed a brief on appeal.

Plaintiff filed a cross-complaint couched in ten causes of action, to the association's first complaint in intervention. The cross-complaint designated as defendants not only the district, its directors, and the Foster defendants, but the association, McFadden, a state senator, the district's lawyer, and others as well. The trial court ordered that the cross-complaint be stricken and plaintiff concedes on appeal that he "could not have a petition and a cross-complaint in the same action."[2]

[1] Plaintiff made a motion to amend his second amended petition for writ of mandate so as to substitute the cross-complaint therefor. The trial court denied the motion and plaintiff does not argue in his brief that such denial was erroneous. Nevertheless, he appears to assume that he may treat the cross-complaint as the appropriate pleading before this court on the ground that "it is the final and most complete statement of the issues which petitioner sought to litigate."

There was ample justification for the trial court's refusal to permit the filing of the cross-complaint as an amended petition for writ of mandate. It appears to be plaintiff's seventh attempt to state a cause of action on substantially similar grounds, three complaints and amendments having been filed in the companion case of *Cooper* v. *Leslie Salt Co.* (S.F. 22616), [*]*ante*, p. —— [—— Cal.Rptr. ——, —— P.2d ——], and three petitions and amended petitions in the present action.

We turn to the second amended petition for writ of mandate, which is couched in six causes of action and names the

[2]Plaintiff has also noticed an appeal from a second judgment of dismissal which was entered (on November 27, 1967) with respect to a defendant named only in plaintiff's cross-complaint. In the light of plaintiff's concession, that purported appeal will be dismissed as moot.

[*]Advance Report Citation: *Ante*, p. ——.

district and its directors as defendants and the Fosters as interveners. As stated, the trial court sustained defendants' general and special demurrers, and dismissed the action.

[2] The first cause of action alleges a melange of activities on the part of defendants. Most of the matters have either been discussed in the companion case of *Cooper* v. *Foster, et al.* or do not constitute assertions of wrongful conduct. The only allegations which do not come within these two categories assert that the district purchased land from the Fosters which had no substantial value and is subletting office space at an exorbitant rental in a building owned by the Fosters, and that the district has made a payment to the Fosters' attorney for services allegedly rendered to the Fosters. It is alleged that T. Jack Foster & Sons is a trustee of the district by virtue of its domination of the district's financial affairs, that plaintiff demanded that T. Jack Foster & Sons account to the district for the benefits received from it, and that such demand was refused.

The prayer is that the Foster defendants be compelled to account for the benefits received from the district or, alternatively, that the district "cause an investigation to be made of the disbursements" to the Fosters and report to the court thereon.

It is immediately apparent that mandamus is not a proper vehicle for the asserted grievances. So far as pertinent here, the writ is available only to compel the "performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station." (Code Civ. Proc., § 1085.) Plaintiff alleges nothing to indicate that Foster has a duty to account to him, nor is it asserted that the district is enjoined by law to "cause an investigation to be made" of its disbursements to Foster.

Plaintiff apparently views the first cause of action as one for an accounting. Any such action must be predicated upon the theory that plaintiff is suing on behalf of the district. Even if such an action by a taxpayer be considered tenable, the petition does not allege that plaintiff is suing on behalf of the district, nor is it alleged that he made a demand upon the district to request an accounting from the Fosters (see 1 Cal. Jur.2d 426) and that such a demand was refused. In fact plaintiff placed in the record a document executed approximately two weeks after the second amended petition was filed, which indicates that because of criticism by certain persons an

audit would be made of all transactions between the district and Foster, to be paid for by these defendants.[3]

[3] The second cause of action alleges that the district paid Hydraulic Dredging Company, not a defendant in this action, a substantial sum of money and that the district's dealings with Hydraulic "were not the result of" public bidding. It is prayed that the district obtain an accounting to show how Hydraulic disbursed the funds and what value it gave for them. Again, the remedy of mandate is inappropriate since the district has no duty to conduct the proposed investigation. There is no allegation of wrongdoing and no grounds are alleged upon which a court may order an accounting.

[4] The third cause of action is based upon an asserted violation of section 193 of the Estero Act. The section as amended in 1963 (Stats. 1963, ch. 995) provides that if the board appoints a depositary for its funds it shall also appoint a finance officer, who must be bonded for at least $250,000. The petition alleges that the district has appointed a depositary, that it had an appropriate bond until the end of 1966, but that plaintiff is informed and believes that the district no longer carries a fiduciary bond in compliance with the section. It is also alleged that the district had refused to inform plaintiff of the terms of any bond it might have. Plaintiff prays that the district either make proof that it has a fiduciary bond in compliance with the section or that it place its funds into the hands of some other body which carries such a bond.

The district in its return replied that such a bond existed and attached a copy of a bond for $250,000, insuring "all offices and departments" of the district. It appears on the face of the pleadings, therefore, that the district did not have an individual bond for a finance officer in the amount of $250,000, as required by section 193, but that all of its employees (and the directors) were insured for this sum in the aggregate.[4]

The district argues that the allegations of the third cause of action are insufficient because they do not allege that the dis-

[3]Defendants assert in their brief, and plaintiff has not disputed, that the audit was completed in November 1967 and is a public record of the district.

[4]Plaintiff also asserts that the bond does not guarantee faithful performance, as required by section 1501 of the Government Code, but an examination of the bond shows that it insures against loss occasioned by the failure of the district's employees or directors to faithfully perform their duties.

trict has in fact employed a finance officer or if a finance officer was employed by the district, that he was acting in that capacity while unbonded. Since the allegations state that section 193 requires the district to employ a finance officer in the event it designates a depositary and it is alleged that a depositary has been chosen by the district, they appear to be sufficient as against a general demurrer. No special demurrers were filed by defendants on the ground that the allegations of the third cause of action were uncertain or ambiguous with regard to whether or not the district employed a finance officer.

As the section requires that a finance officer be employed and bonded if a depositary is designated, and such designation is alleged, the relief to which plaintiff would be entitled is to compel the district to secure a faithful performance bond for $250,000 to insure its finance officer, if the district has not already done so. Accordingly, the trial court erred in sustaining the demurrer to the third cause of action.

[5] The allegations of the fourth cause of action appear incomprehensible. It is asserted that certain money was transferred by the district from a park fund to a reclamation fund, that the money in the reclamation fund will be used to make "additional interest payments" on reclamation bonds when they become due, that these future interest payments will exceed the amount in the reclamation fund so that additional monies will be removed from other bond funds for transfer to the recalamtion fund, and that all this is "in violation of law."

It is prayed that the directors be compelled to replace the money transferred from the park fund and to cease transferring money from any fund except for the purposes "lawfullv authorized by the election . . . authorizing the sale of bonds to create the fund."

Although the broad general allegation is made that all these activities are in violation of law, this is merely a conclusion and no facts are alleged which would justify the granting of any relief. The trial court obviously acted properly in sustaining the demurrer to the fourth cause of action.

[6] The fifth cause of action alleges that, according to a bond statement issued by the district, it plans to pay over $2,012,000 for "interest and other expenses" from the proceeds of water or sewer bonds and over $6,000,000 from the proceeds of other bonds to pay interest in the years after

1967. It is also alleged that a resolution of the board states that $2,400,000, or more than 25 percent of the current bond issues, will be used to pay interest on these and prior bonds within the next 12 months and that the election authorizing the issuance of the bonds did not authorize their use for payment of interest on prior outstanding bonds. It is prayed that a judgment be issued directing that none of the bond sale proceeds be used for payment of interest on prior bonds.

It does not appear that the payment of interest from bond proceeds is illegal,[5] or that the law requires that a bond "election" specifically "authorize" the use of proceeds for payment of interest. According to sections 106 and 107 of the Estero Act, the board may call a bond election by a resolution, which may submit to the voters the question of issuing bonds "to make all the outlays or so many of them as may be selected." The fifth cause of action alleges that the board in its resolution stated that more than $2,400,000 of current bond sales would be used to pay interest on bonds, and there is no allegation that the provisions of sections 106 and 107 were not complied with as to the other bond sales mentioned in the fifth cause of action.

[7] The sixth cause of action seeks to compel the district to obtain a welter of financial details and other information from T. Jack Foster & Sons before the district expends any further funds for the "benefit of T. Jack Foster & Sons or their lands."[6] The grounds upon which this relief is sought are that T. Jack Foster & Sons has outstanding debts in large sums, that "it is improper" for the district to spend further public money on Foster lands unless Foster will be able to complete the development of the land, and that "it is doubtful that there will be sufficient value after improvement to yield taxes for repayment of interest and bonds unless capital is invested by T. Jack Foster & Sons."

What has been said above regarding the availability of mandamus to secure the relief sought in the first cause of action is also applicable with regard to the sixth. We can discern no remedy to which plaintiff is entitled under these nebulous allegations.

[5]Section 178 of the act provides that the proceeds of bond moneys may be used for interest and working capital for the period of construction and for 12 months thereafter.

[6]It is also prayed that the district be directed to pay plaintiff's attorneys' fees and costs if the action results in recovery of money for the district.

The judgment entered October 31, 1967, is reversed insofar as it dismisses the third cause of action against defendant district, and the trial court is directed to allow the district reasonable time in which to answer if it be so advised; in all other respects and as to all other defendants that judgment is affirmed.

Plaintiff's purported appeal from the judgment entered November 27, 1967, is dismissed.

Each side is to bear its own costs on appeal.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Mosk, J., and Sullivan, J., concurred.

[Crim. No. 12753. In Bank. Mar. 21, 1969.]

THE PEOPLE, Plaintiff and Respondent, v. JOHN ANTHONY GREEN, Defendant and Appellant.

[On hearing after decision by the Court of Appeal, Second Appellate District, Division Five, Crim. No. 13925 (265 A.C.A. 1, 71 Cal.Rptr. 100) reversing judgment of the superior court. Judgment reversed.]

[1a-1c] **Criminal Law—Rights of Accused—Confrontation by Witnesses: Evidence at Preliminary Examination—Prior Inconsistent Statements.**—In a nonjury trial for furnishing a narcotic to a minor (Health & Saf. Code, § 11532), the introduction into evidence of prior inconsistent statements of the minor, not restricted to impeachment purposes but to prove the truth of the matters asserted (Evid. Code, § 1235), constituted a denial of defendant's Sixth Amendment right to confrontation, and it was immaterial that he had been cross-examined at the preliminary hearing in which the prior statement had been made, where the trial judge had not presided at that hearing.

[2a, 2b] **Id.—Rights of Accused—Confrontation by Witnesses: Hearsay—Evidence at Former Trial.**—The factor of "neces-

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[1] Extrajudicial statements by witness who is subject to cross-examination as evidence of facts to which they relate, note, 133 A.L.R. 1454. See also, Cal.Jur.2d, Criminal Law, § 139; Evidence, § 382; Am.Jur.2d, Criminal Law, § 343; Evidence, § 500.

McK. Dig. References: [1] Criminal, §§ 105, 486.5; [2, 3] Criminal Law, §§ 105, 482; [4, 5] Witnesses, § 118; [6] Criminal Law, § 658(1); [7] Criminal Law, § 153; [8, 9] Criminal Law, § 175(2); [10] Criminal Law, § 485; [11] Criminal Law, § 1382(25).

[S. F. No. 22616. In Bank. Apr. 17, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. LESLIE SALT COMPANY et al., Defendants and Respondents.

[S. F. No. 22617. In Bank. Apr. 17, 1969.]

WALTER S. COOPER, Plaintiff and Appellant, v. T. JACK FOSTER et al., Defendants and Respondents.

[Modification of opinion (70 A.C. 669, —— Cal.Rptr. ——, —— P.2d ——).]

THE COURT.—The opinion herein, appearing at 70 A.C. 669, is modified by deleting from the sentence which commences on line 12 of page 678 the word "two," and inserting in lieu thereof the figure "22." As so modified such sentence will read as follows: "(c) It is alleged that Innes, a Foster employee and a director of the district, caused the Associated Dredging Company to submit statements to the district pursuant to which [ ] [22] district checks totaling $860,218.05 were issued and delivered to Associated with the understanding that they would be indorsed to respondent Midwest Dredging Corporation, a Foster subsidiary."

[S. F. No. 22619. In Bank. Apr. 17, 1969.]

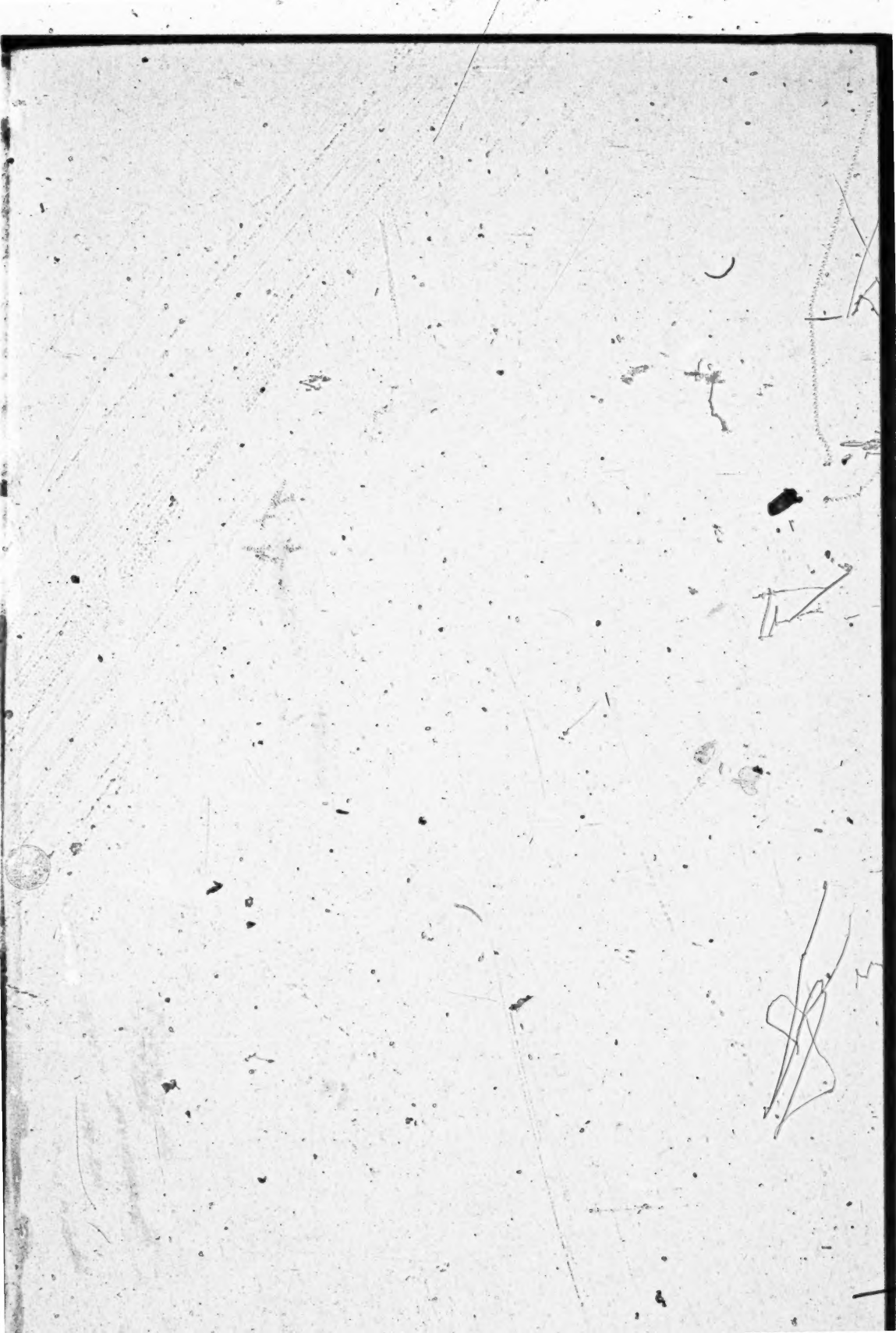
WALTER S. COOPER, Plaintiff and Appellant, v. ESTERO MUNICIPAL IMPROVEMENT DISTRICT et al., Defendants and Respondents; T. JACK FOSTER et al., Interveners and Respondents.

[Modification* of opinion (70 A.C. 687, —— Cal.Rptr. ——, —— P.2d ——).]

[1] **Mandamus — Pleading — Amendment.** — In a taxpayer's mandamus proceeding to test the activities of the Estero Municipal Improvement District, its directors, and certain landowner developers of the district, in which petitioner filed a cross-complaint couched in 10 causes of action to a complaint in intervention filed in behalf of 2,000 residents of the district, which cross-complaint designated as defendants the district, its directors, the landowner developers, and others, the trial court properly denied plaintiff petitioner's motion to amend his second amended mandamus petition so as to substitute the cross-complaint therefor, where the latter appeared to be plaintiff's seventh attempt to state a cause of action on substantially similar grounds.

THE COURT.—The opinion herein, appearing at 70 A.C. 687, is modified by deleting from the sentence which commences on line 13 of page 691 the words "the association." As so modified such sentence will read as follows: "The cross-complaint designated as defendants not only the district, its directors, and the Foster defendants, but McFadden, a state senator, the district's lawyer, and others as well."

*This modification requires the substitution of a new headnote No. [1] for the note previously appearing.



An act to create the Estero Municipal Improvement District and to prescribe its boundaries, organization, powers, operation, management, financing, change of boundaries, and dissolution. (Stats 1960, ch 82, as amended by Stats 1963, ch 995 and Stats 1965, ch 2043)

[Approved by Governor May 11, 1960. Filed with Secretary of State May 11, 1960.]

The people of the State of California do enact as follows:

Article 1. General Provisions

SECTION 1. The Estero Municipal Improvement District is hereby created to consist of the territory described as follows:

All that certain real property situate in the County of San Mateo, State of California, being a portion of the lands of the Schilling Estate Company, and being more particularly described as follows:

Beginning at a point on the northerly boundary line of lands described in Parcel One of the Deed from Arden Investment Company, a corporation, to Schilling Estate Company, a corporation, dated February 7, 1939, and recorded February 21, 1939 in Book 821 of Official Records of San Mateo County at page 446 (53131-D), from which point the Guano Island Triangulation Station of the United States Coast and Geodetic Survey, marked by a brass tablet, bears N 34°33'30" W 154.78 feet; thence from said point of beginning along said northerly boundary line of Parcel One N 41°09'30" E 355.40 feet; thence

continuing along the northeasterly boundary of said Parcel One S 52°19'30" E 1037.90 feet, and S 54°59'30" E 450 feet to a point thereon; thence leaving said boundary of Parcel One of said Deed, S 35°30'00" W 5584.80 feet; thence at right angles N 54°30'00" W 3794.93 feet to an angle point in the easterly line of lands described in Deed from Schilling Estate Company, a corporation, to Thomas Therkeldsen, also known as Thomas Therkildsen, dated January 26, 1955 and recorded May 24, 1955 in Book 2803 of Official Records of San Mateo County at page 366, said point being described as being "500 feet North of and 200 feet West of the section corner common to Sections 22, 23, 26, and 27" in said Deed; thence leaving the boundary of lands described in said last mentioned Deed, N 0°09'30" W 2086.18 feet to a point on said northerly boundary of Parcel One of the Deed first above described, distant on said boundary S 83°08'00" E 124.10 feet from the westerly terminus of the course described therein as "S 83°08' E 1662.10 feet"; thence along said northerly boundary of Parcel One the following courses: S 83°08'00" E 1538.00 feet, thence tangent to the preceding course on the arc of a curve to the left having a radius of 1582.70 feet and a central angle of 27°08'30" an arc distance of 749.75 feet, thence tangent to the preceding curve N 69°43'30" E 2824.80 feet to the point of beginning, and containing 418.55 acres of land, more or less.

Excepting therefrom that certain parcel described as Exception One to parcel One of the above described Deed from Arden Investment Company to Schilling Estate Company, and containing 18.42 acres of land, more or less.

SEC. 2. This act shall be known and may be cited as Estero Municipal Improvement District Act.

Article 2. Definitions

SEC. 10. The terms defined in this article have the meaning set forth unless the context requires a different meaning.

SEC. 11. "District" means the Estero Municipal Improvement District.

SEC. 12. "Board" means the board of directors of the district.

SEC. 13. "President" and "secretary" mean the president and secretary, respectively, of the district.

SEC. 14. "County" means the County of San Mateo.

SEC. 15. "Board of supervisors" means the board of supervisors of the county.

SEC. 16. "Charges" includes fees, tolls, rates and rentals.

SEC. 17. "Land" means land in the district and does not include improvements or personal or utility property.

SEC. 18. "Legal representative" means an officer or other person or persons appointed to serve as such by the board of directors of a corporation owner.

SEC. 19. "Owner" means the owner of land as shown on the last equalized county assessment roll.

SEC. 20. "Voter" means an owner, or the officer appointed therefor by the board of directors of a corporation owner, or the legal representative of the owner.

SEC. 21. "Officers of election" consist of an inspector and two judges. They shall be persons appointed by the board of directors and need not be voters.

SEC. 22. In the application to the district of laws, the procedure of which is made applicable to proceedings of the district, terms used in those laws shall have the following meanings:

(a) "City council," "council" and "legislative body" mean board.

(b) "City," "municipality" and "local agency" mean district.

(c) "Clerk" and "city clerk" mean the secretary of the district.

(d) "Superintendent of streets," "street superintendent" and "city engineer" mean the engineer of the district or other person appointed to perform such duties, to be called district engineer.

(e) "Tax collector" means the tax collector of the district.

(f) "Treasurer" and "city treasurer" mean the county treasurer or district finance officer.

(g) "Auditor" means the county controller or district finance officer.

(h) "Budget Law" means Chapter 1 (commencing at Section 29000) of Division 3 of Title 3 of the Government Code.

SEC. 23. In the application of any law to this district, said law shall be as then amended.

Article 3. General Administrative Provisions

SEC. 26. The board is the governing body of the district and shall consist of three (3) members, one of whom shall be president. The officers of the district are the three members of the board and a secretary. The district may have a finance officer, and other officers as the board may from time to time create. An owner may nominate an officer or a legal representative for each office to be filled by election or appointment.

SEC. 27. The first district board shall be elected at an election conducted by the board of supervisors immediately following the formation of the district. The first district board shall classify itself by lot so that one director will hold office for two years and two directors will hold office for four years following the district formation or until their successors have been elected or appointed and qualified.

SEC. 28. Two directors shall be owners, or officers or legal representatives of owners and shall be nominated and elected or appointed in accordance with Article 4. Commencing in the year 1964 and each four years thereafter one of the expiring terms of director shall be filled by a public member designated and appointed by the county board of supervisors.

SEC. 29. The term of each director, after the first board, shall be four years, or until the election or appointment, and qualification of his successor.

SEC. 30. All vacancies occurring in the office of director shall be filled by appointment by the remaining directors.

SEC. 31. An appointment to fill a vacancy in the office of director shall be for the unexpired term of the office in which the vacancy exists, and until the election or appointment of his successor.

SEC. 32. Once each year, the board shall elect one of its members to serve as president, shall appoint a secretary and shall fill any other offices as it may from time to time create.

SEC. 33. The president shall be a member of the board and the secretary and other officers and employees may be members of the board.

SEC. 34. The board shall act only by ordinance, resolution, motion or contract.

SEC. 35. A majority of the board shall constitute a quorum for the transaction of business.

SEC. 36. No ordinance, resolution, motion or contract shall be passed or become effective without the affirmative vote of at least the majority of the members of the board.

SEC. 37. Except where action is taken by the unanimous vote of all members present and voting, the ayes and noes shall be taken upon the passage of all ordinances, resolutions, motions or contracts and entered upon the minutes of the board.

SEC. 38. The enacting clause of all ordinances passed by the board shall be "Be it ordained by the Board of Directors of the Estero Municipal Improvement District, as follows:".

SEC. 39. All ordinances shall be signed by the president and attested by the secretary.

SEC. 40. All legislative sessions of the board shall be public.

SEC. 41. The board, by ordinance, shall provide for the time and place of holding its regular meetings, the manner of calling special meetings, and shall establish rules for its proceedings.

SEC. 42. Each officer shall receive such compensation as the board shall, by ordinance, establish; provided, however, that compensation of each director for attendance at meetings shall not exceed twenty-five dollars ($25) for each meeting of the board attended by him, not exceeding three (3) meetings in any calendar month.

SEC. 43. All contracts, deeds, warrants, releases, receipts and documents shall be signed in the name of the district by the president and countersigned by the secretary.

SEC. 44. If allowed by the board a director may receive traveling and other expenses incurred by him when acting for the board, and compensation for any other services rendered by him for the district.

SEC. 45. The finance officer shall serve at the pleasure of the board. He and the secretary shall receive such compensation as the board shall determine.

SEC. 46. The county treasurer, county controller, and county tax collector shall be ex officio officers of the district.

SEC. 47. All county officers shall be liable under their several official bonds for the faithful discharge of the duties imposed upon them by this act.

SEC. 48. In addition to the duties prescribed herein the officers of the district shall have such duties as are prescribed by the board.

Article 4. Elections

SEC. 55. A general district election shall be held on the fourth Tuesday in March in every other year commencing with the second year following the formation of the district.

SEC. 56. A special election may be called by the board to be held at any time.

SEC. 57. The hours during which the polls shall be opened at any general or special district election shall be as established by the board.

SEC. 58. Notices of elections shall be given as nearly as practicable in accordance with the general laws regarding notices of municipal elections.

SEC. 59. Nominations for the position of director shall be in writing, shall be signed by voters representing at least 10 percent of the assessed valuation of land in the district as shown by the last equalized assessment roll, shall be filed, for the first election following the formation of the district, with the county clerk, and, for all subsequent elections, with the secretary of the district, not more than 45 nor less than 25 days before the election.

SEC. 60. No voter shall sign any more nominations than there are offices to be filled.

SEC. 61. If on the 24th day prior to a general district election only one person has been nominated for each of the positions to be filled at that election, or no person has

been nominated for any such office, or offices, an election shall not be held.

SEC. 62. In such case the notice of election shall, instead of calling an election, state that no election is to be held but that the board of supervisors shall appoint those nominated for positions of directors, or, if no person has been nominated, the board of supervisors shall appoint any qualified person to the position.

SEC. 63. If, pursuant to Section 62, a general district election is not held, the board of supervisors of the County of San Mateo, at a meeting held prior to the day fixed for the election, shall appoint to the positions of directors those persons nominated, or, if no persons are nominated, any qualified persons, who shall qualify and serve as if elected at a general district election.

SEC. 64. Each voter shall have one vote for each one dollar ($1) in assessed valuation of land owned by him as shown by the last equalized assessment roll.

SEC. 65. A majority of the votes cast shall be required to elect a director or approve a proposition.

SEC. 66. Following the close of the polls the officers of election shall canvass the ballots. The ballots and returns shall be sealed and delivered to the secretary or president.

SEC. 67. The board shall meet and canvass the returns and enter the returns on its minutes. The entry shall be conclusive evidence of the fact and regularity of all prior proceedings and of the facts stated in the entry.

SEC. 68. Except as provided in this act the election shall be conducted as nearly as practicable in accordance with the general laws for cities.

Article 5. Powers

SEC. 75. The district may use a seal, alterable at the pleasure of the board.

SEC. 76. The district may sue and be sued by its name.

SEC. 77. The district may acquire, construct, reconstruct, alter, enlarge, lay, renew, replace, maintain and operate, street and highway lighting facilities; facilities for the collection, treatment and disposal of sewage, industrial wastes, storm waters, garbage and refuse; the production, storage, treatment and distribution of water for public and private purposes; parks, playgrounds and works to provide for the drainage of roads, streets and public places, including, but not limited to curbs, gutters, sidewalks and grading and pavement; and the reclamation of submerged or other land by watering or dewatering.

SEC. 78. The district may acquire or construct the reclamation of land for private small craft harbor purposes, by grading, excavation and fill, and acquire or construct therein or in connection therewith breakwaters, levees, jetties, bulkheads, walls of rock or other materials, wharves, piers, docks, slips, quays, moles, launching facilities, and roadways, walkways, parking places, drainage facilities, sewer, water, lighting, garbage and refuse disposal, and all works or utilities incidental to or necessary or useful in the operation of such harbor; and finance the costs thereof through an improvement district of the area of said facilities.

SEC. 79. The district may acquire, construct, maintain and operate facilities for providing fire protection to the district and its occupants or inhabitants, including build-

ings, engines, hose, hose carts, or carriages, and other appliances and supplies for the full equipment of fire companies or departments and a police department, to protect and safeguard life and property.

SEC. 79a. The district may acquire or construct conduits and other underground gas, telephone and electrical facilities required under any rules and regulations adopted by any public utility pursuant to the rules, regulations and orders of the Public Utilities Commission, and may sell such facilities in the manner provided by Article 9 (commencing at Section 50550), Chapter 2, Part 1, Division 1, Title 5 of the Government Code; and bridges, culverts, underpasses and viaducts.

SEC. 80. The district may take, acquire, hold, use, lease and dispose of property of every kind within or without the district, necessary, expedient or advantageous to the full exercise and economic enjoyment of its purposes and powers.

SEC. 81. The district may exercise the right of eminent domain for the condemnation of private property for public use within but not without the district. The board has the same rights and powers with respect to the taking of property for the public uses of the district as are now or may hereafter be conferred by general law on the legislative body of a city. The provisions of Title 7 (commencing at Section 1237) of Part 3 of the Code of Civil Procedure shall apply.

SEC. 82. Notwithstanding the provisions of Sections 80 and 81 of this act, the district shall not acquire property located outside the district boundaries without first ob-

taining the consent of the board of supervisors of the county in which the property to be acquired is located.

SEC. 83. The district may make and accept contracts, deeds, releases and documents that, in the judgment of the board, are necessary or proper in the exercise of any of the powers of the district.

SEC. 84. The district may co-operate and contract with the federal government of the United States and with the State of California, or with any county, municipal corporation, district, or other public corporation, or with any person, firm or corporation, for the joint acquisition, construction, or use or aid in the construction of any facilities which the district has the power to acquire or construct under this act or for the providing of any service within the powers of the district.

SEC. 85. The district may borrow money and provide for its repayment in the manner provided in Article 7 (commencing at Section 53820) of Chapter 4 of Part 1 of Division 2 of Title 5 of the Government Code.

SEC. 86. The district may guarantee the performance of any of its transactions.

SEC. 87. The district may incur bonded indebtedness and issue bonds in the manner herein provided.

SEC. 88. Bonds issued by the district shall be of the form and executed in the manner provided by the board.

SEC. 89. If any officer whose signature or countersignature appears on bonds or coupons ceases to be such officer before delivery of the bonds, his signature shall be as effective as if he had remained in office.

SEC. 90. Any bonds issued by the district organized under the provisions of this act are given the same force, value and use as bonds issued by any municipality and shall be exempt from all taxation within the State.

SEC. 91. The district may refund or retire any public indebtedness or lien that may exist or be created against the district or any property therein which shall have arisen out of the transaction of the affairs of the district.

SEC. 92. The district may issue warrants on any moneys with the county treasurer in payment of district obligations. The warrants shall be registerable as provided for county warrants when not paid for want of funds. Demands allowed by the board shall be prepared, presented, and audited in the same manner as demands upon the funds of the county, but free of the limitation of any budget law.

SEC. 93. The district may cause special assessments to be levied and collected and issue bonds to represent unpaid assessments on the basis of benefit to the properties assessed for the purpose of financing the acquisition and construction of public improvements.

SEC. 94. The district may appoint, employ and fix the compensation of engineers, attorneys, assistants and other employees as it deems proper.

SEC. 95. The district may sell any effluent or other product resulting from the operation of any treatment or disposal plant or facility constructed or acquired by or for the district.

SEC. 96. The district may take out insurance in the form and in the amounts as the board may deem neces-

sary for the adequate protection of the district's property, officers, employees and interests.

SEC. 97. The district may make and enforce all necessary and proper regulations, not in conflict with the laws of this State, for the removal of garbage and refuse and the supplying of sewage, light, water, storm water and fire and police protection service. A violation of a regulation of the district is a misdemeanor punishable as such. A regulation of the board shall be adopted by ordinance and shall be posted for one week in three public places in the district and shall take effect upon expiration of the week of such posting. A subsequent finding of the board, entered in its minutes, that posting has been made is conclusive evidence that the posting has been properly made.

SEC. 98. The district may compel all residents and property owners in the district to connect their houses, habitations and structures requiring sewage or drainage disposal service with the sewer and storm drains of the district, and to use district garbage and refuse removal service and facilities.

SEC. 99. The district may prescribe, revise and collect charges for services and facilities furnished by it, for the regulation thereof and for revenue. Charges may be collected either singly or collectively, and the board may establish rules governing their levy and collection.

Article 6. General Obligation Bonds

SEC. 105. The district may issue bonds as provided in this article for any of the purposes stated in Sections 77, 78, 79 and 80.

SEC. 106. By resolution, when in its judgment it is advisable, the board may call an election and submit to the voters of the district the question of whether bonds shall be issued.

SEC. 107. The resolution calling the election may submit as one proposal the question of issuing bonds to make all the outlays or so many of them as may be selected, or the resolution may submit at the election as separate questions the issuance of bonds for any of the outlays singly or in combination.

SEC. 108. Notices of bond elections shall be given as nearly as practicable in accordance with the general laws regarding notices of municipal elections.

SEC. 109. The vote shall be by ballot, without reference to the general law in regard to the form of ballot.

The ballot shall contain the words "Bonds—Yes" and "Bonds—No," and the person voting at the election shall put a cross (+) upon his ballot after the "Yes" or "No" to indicate whether he has voted for or against the bonds.

SEC. 110. Following the close of the polls the officers of election shall canvass the ballots. The ballots and returns shall be sealed and delivered to the secretary or president. The board shall meet and canvass the returns and enter the returns in its minutes.

The entry is conclusive evidence of the fact and regularity of all prior proceedings, and of the facts stated in the entry. No informality shall affect the validity of said bonds.

SEC. 111. Except as herein provided, the election shall be conducted as nearly as practicable in accordance with the general laws for cities.

SEC. 112. If, at the election, two-thirds of the votes cast are in favor of the issuance of bonds, the board may issue and dispose of the bonds.

SEC. 113. Bonds issued by the district under the provisions of this article shall be of such denomination as the board determines except that no bonds shall be of a denomination less than one hundred dollars ($100) or greater than one thousand dollars ($1,000).

SEC. 114. The bonds shall be payable in lawful money of the United States at the office of the treasurer or at such other place, depositary, paying agent or fiscal agent within or without the State of California as may be designated by the board, and bear interest at a rate not exceeding six percent (6%) per annum, payable semi-annually in like lawful money, except the first year which may be for more or less than one year.

SEC. 115. No bonds shall be payable in installments, but each shall be payable in full on the date specified therein by the board. The board may provide that all bonds issued by the district may be subject to retirement at any time prior to maturity, in which event they shall so state on their face.

SEC. 116. Each bond shall be signed by the president and countersigned by the secretary. The signature of the president on the bonds and of the secretary on the coupons may be printed, lithographed or engraved and such shall constitute due execution.

SEC. 117. The bonds shall be numbered consecutively, beginning with number one, and shall have coupons attached referring to the number of the bond.

SEC. 118. Before selling the bonds, or any part thereof, the legislative body shall give notice inviting sealed bids in such manner as the legislative body may prescribe. If satisfactory bids are received, the bonds offered for sale shall be awarded to the highest responsible bidder. If no bids are received, or if the legislative body determines that the bids received are not satisfactory as to price or responsibility of the bidders, the legislative body may reject all bids received, if any, and either readvertise or sell the bonds at private sale.

SEC. 119. The term of bonds issued shall not exceed forty (40) years.

SEC. 120. The resolution providing for the issuance of the bonds, by its adoption, shall be conclusive evidence of the regularity of said bond proceedings.

SEC. 121. The board may, in its discretion, before or after issuance, commence in the superior court of the county, a special proceeding to determine its right to issue the bonds and their validity, similar to the proceedings in relation to irrigation bonds, provided for by the Irrigation District Law, Division 11 (commencing at Section 20500) of the Water Code, and all supplementary acts, and all their provisions apply to and govern the proceedings to be commenced by the board, so far as applicable. The judgment has the same effect as a judgment in relation to irrigation bonds under the provisions of that law. The board may use the same procedure to

validate the creation of the district and any annexations thereto.

SEC. 122. An issue of bonds is the aggregate principal amount of all bonds authorized to be issued in accordance with a proposal submitted to and approved by the voters of the district, but no indebtedness will be deemed to have been contracted until bonds shall have been sold and delivered and then only to the extent of the principal amount of bonds sold and delivered.

SEC. 123. The board may, in its discretion, divide the aggregate principal amount of an issue into two or more divisions or series and fix different dates for the bonds of each separate division or series. In the event any authorized issue is divided into two or more divisions or series, the bonds of each division or series may be made payable at the time or times as may be fixed by the board separate and distinct from the time or times of payment of bonds of any other division or series of the same issue.

Article 7. Improvement District Bonds

SEC. 130. Bonds of a portion of the district may be authorized and proceedings therefor shall be had in the manner now or hereafter provided for the issuance of bonds for a portion of a county water district.

Article 8. Revenue Bonds

SEC. 135. The district may create revenue bond indebtedness for the acquisition and construction, or acquisition or construction of any improvements or property or facilities contained within its powers.

SEC. 136. Proceedings for the authorization, issuance, sale, security, and payment of revenue bonds shall be had, the board shall have the powers and duties, and the bondholders shall have the rights and remedies, all in substantial accordance with and with like legal effect as provided in the Revenue Bond Law of 1941, Chapter 6 (commencing at Section 54300) of Part 1 of Division 2 of Title 5 of the Government Code; provided, however, that qualified voters at the election therein provided shall be voters as defined in this act, and the method of voting shall be as herein provided. As used therein the word "resolution" shall mean ordinance, the words "local agency" shall mean district, and the words "legislative body" shall mean board.

Article 9. Assessment Bonds

SEC. 150. The Municipal Improvement Act of 1913, Division 12 (commencing at Section 10000) of the Streets and Highways Code, the Improvement Act of 1911, Division 7 (commencing at Section 5000) of the Streets and Highways Code, the Street Opening Act of 1903, Part 1 (commencing at Section 4000) of Division 6 of the Streets and Highways Code, and the Improvement Bond Act of 1915, Division 10 (commencing at Section 8500) of the Streets and Highways Code, as now or hereafter provided, are applicable to the district.

SEC. 151. The provisions of any act to the contrary, it shall not be necessary to obtain the consent of the county to conduct assessment proceedings. No assessment or bond hereafter levied or issued shall become a lien and no person shall be deemed to have notice thereof until a

certified copy of the assessment and the diagram attached thereto shall be recorded in the office of the district engineer and in the office of the county engineer of the county.

Article 10. Taxation—County Roll

SEC. 160. The lien for taxes for the first fiscal year after the district is formed shall attach on the first Monday in March or on the date the district is created, whichever is later. It shall not be necessary to make or file a notice of the creation of this district.

SEC. 161. Annually, at least fifteen (15) days before the first day of the month in which the board of supervisors is required by law to levy the amount of taxes required by law for county purposes, the board shall furnish to the board of supervisors a written statement of the following:

1. The amount necessary to pay the interest on bonds for that year, and the portion of the principal that is to become due before the time for making the next general tax levy.

2. The amount necessary to maintain, operate, extend, or repair any work or improvements of the district, and to defray all other expenses incidental to the exercise of any of the district powers or to pay any existing obligations of the district.

SEC. 162. The board of supervisors shall at the time and in the manner of levying other county taxes, levy and cause to be collected a tax upon the taxable real and personal property in the district, based upon the last

equalized assessment roll of the county, sufficient to pay the amounts set forth in the statement of the board. The aggregate taxes levied for any one fiscal year, other than those levied to pay the principal and interest on bonds, shall not exceed five dollars ($5) on each one hundred dollars ($100) of the assessed valuation of taxable real and personal property in the district.

SEC. 163. If the board fails to furnish the written statement, the board of supervisors shall ascertain the amount necessary to pay the interest on the bonds for that year and the portion of the principal that is to become due before the proceeds of the next general tax levy shall become available, and shall levy and cause to be collected the amount.

SEC. 164. The tax shall be collected at the same time and in the same manner as the general tax levy for county purposes, and when collected, shall be paid into the county treasury to the credit of the proper district fund, as provided in Article 12. The board shall control and order its expenditure.

SEC. 165. The principal and interest on district bonds shall be paid by the treasurer, if payable at his office, in the manner now or hereafter provided by law for the payment of principal and interest on the bonds of the county, unless said bonds shall be made payable elsewhere.

SEC. 166. Compensation to the county for the performance of services described in this article shall be fixed by the parties.

Article 11. Alternative Tax Procedure

SEC. 170. The alternative procedure of the County Water District Law for the levy and collection of district taxes shall apply.

Article 12. Funds

SEC. 175. In a fund called the "Estero Municipal Improvement District General Fund," the treasurer shall place and keep the money levied by the board for that fund.

SEC. 176. The proceeds of the sale of revenue bonds or general obligation bonds or proceeds of special assessments levied by the board shall be deposited with the treasurer and shall be placed in a fund to be called the "Estero Municipal Improvement District Construction Fund No. ....." (inserting number).

SEC. 177. The money in any construction fund shall be used for the purpose indicated in the resolution calling the election upon the question of the issuance of bonds, or for the purpose described in the resolution of intention in the assessment proceedings, or for repayment of money borrowed for the purpose of financing the improvement for which bonds were subsequently issued or the assessment levied.

SEC. 178. The bond moneys may also be used for interest and working capital for the period of construction and for twelve (12) months thereafter, and also to pay the costs of their authorization and issuance including fees for legal, engineering, fiscal, economic or other service.

SEC. 179. Any money in the construction fund determined by resolution of the board to be in excess of the amounts required for completion of the improvement authorized may, by the resolution so determining, be transferred to any other fund of the district and be used for any lawful purpose.

SEC. 180. In a fund called the "Estero Municipal Improvement District Bond Fund, _____" (inserting series number), the treasurer shall keep money levied or collected for that fund.

SEC. 181. No part of the money belonging in the bond fund may be transferred to any other fund or be used for any purpose other than the payment of principal and interest of the bonds of the district, or for repayment of money borrowed for the purpose of paying the principal and interest of the bonds of the district, until said bonds are fully paid, at which time it may be transferred to any other fund.

SEC. 182. The budget law shall not apply to the district.

Article 13. Alternative Depositary of District Money

SEC. 190. The provisions of this article are alternative or supplemental to those providing for the use of the county treasury.

SEC. 191. The board may by resolution designate a bank as depositary of any or all of its funds. No question of interest shall affect such appointment. If the depositary is not designated for all of its funds, it shall designate what funds are to be deposited with the depositary. The

county treasurer shall be the depositary for all funds not so designated.

SEC. 192. The charges of any depositary selected shall be a proper expense of the district.

SEC. 193. If the board appoints a depositary, it shall appoint a person who shall be known as finance officer, who shall serve at its pleasure. It shall fix the amount of his compensation. It shall fix the amount of and approve his bond which in no event may be less than two hundred fifty thousand dollars ($250,000).

SEC. 194. Bond principal and interest and salaries shall be paid when due. All other claims and demands shall be approved in writing or in open meeting by a majority of the members of the board.

SEC. 195. Warrants shall be drawn by the finance officer and signed by the president and secretary, or one of them and one member of the board.

SEC. 196. The finance officer shall install and maintain a system of auditing and accounting that shall completely and at all times show the financial condition of the district.

SEC. 197. The finance officer shall make annual or earlier written reports to the board, as it shall determine, as to the receipts and disbursements and balances in the several accounts under his control. The report shall be signed by him and filed with the secretary.

Article 14. Changes in Organization

SEC. 205. Territory may be annexed to or detached from the district, if such territory would qualify for an-

nexation to or detachment from a county water district, and other changes of organization or reorganizations may be made, all in the manner and as provided in Division 1 (commencing at Section 56000) of Title 6, Government Code.

SEC. 206. Territory may be excluded from the district in the manner now or hereafter provided for the exclusion of territory from a county water district. Land and improvements shall mean land.

SEC. 207. Whenever any portion of the district is included within a city by annexation to the city such portion may be withdrawn from the district. The legislative body of the city may provide, by resolution, that such territory shall be withdrawn from the district. Such withdrawal shall be effective on the date fixed by the legislative body of the city. Where the withdrawal is effective on or before February 1st of the fiscal year the district shall furnish district services to the territory until the first day of July next succeeding. Where the withdrawal is effective subsequent to February 1st of the fiscal year and where the territory is subject to district taxation and assessment the district shall furnish district services to the territory until the thirtieth day of June of the fiscal year next succeeding.

SEC. 208. Whenever any portion of the district is included within a city by reason of incorporation of the city, such portion may be withdrawn from the district. Such withdrawal shall be effective upon the filing with the State Board of Equalization, the governing body of the district, the county clerk or registrar of voters, and the county assessor, of copies of a resolution of the legis-

lative body of the city, describing the included portion, and declaring such portion withdrawn.

SEC. 209. Upon the withdrawal of any territory of the district pursuant to Section 207 or 208:

(a) If the assessed value of the real property within the area withdrawn represents one-half of 1 percent, or less, of the total assessed value of the real property within the district prior to the withdrawal, as determined from the last equalized assessment roll of the property within the district, all of the property and assets of the district shall be retained by the district.

(b) If the assessed value of the real property in the area withdrawn exceeds the amount prescribed by subdivision (a), the city and the district shall have six months from the effective date of the withdrawal in which, after giving consideration to all factors involved, including population, assessed valuation, the effect of the annexation or change of boundaries on the remaining portion of the district, the length of time the portion being withdrawn has paid taxes and the total amount of such taxes paid, and such other matters as should be considered in arriving at an equitable distribution, they may establish a mutually agreeable basis for the distribution of the property and assets of the district between the city and the remaining district. If, within such period a mutually agreeable basis is reached, the property and assets of the district shall be distributed between the city and the remaining district upon such basis.

(c) If, under the provisions of subdivision (b), no mutually agreeable basis for the distribution of the property and assets of the district is reached within the six-

month period, on the date the district ceases to furnish district services to the area withdrawn or upon the end of the six-month period, whichever is the last to occur, all of the property and unencumbered funds of the district shall be divided between the city and the remaining district in proportion to the average assessed value of the real property within the area withdrawn to the average assessed value of the real property within the entire district during the five-year period prior to the effective date of the withdrawal, as determined from the equalized assessment rolls for such period.

All funds and property received by the city shall be used exclusively and directly for the types of services furnished by the district; provided, that nothing herein shall prevent the sale of property not needed for such purposes for its fair market value if the funds derived from such sale are used solely for such purposes.

For the purpose of this section, the unencumbered funds are the sum of money, uncollected taxes, and other uncollected amounts in excess of an amount sufficient to pay all claims and accounts against the district, but shall not include funds necessary for the maintenance and operation of the district for any period for which the district has the duty to provide district services within the area withdrawn.

SEC. 210. Property in territory withdrawn or detached from the district shall continue to be subject to tax, levied as provided in Section 162, to pay the principal of and interest on bonds issued for the account of the district and outstanding at the time of such withdrawal or detachment.

SEC. 211. (a) When land, upon which there are structural improvements owned, being acquired or leased by the district, is withdrawn from the district and included in a city by incorporation, annexation or otherwise, the city shall, if it succeeds to the rights of the district in such structural improvements, as a part of the division of property provided for in Section 209, assume the outstanding liability of the district in connection with the acquisition or leasing of such improvements.

(b) In every case where land, upon which there is a structural improvement owned, being acquired or leased by the district, is proposed to be annexed to a city, the clerk of such city shall cause written notice of such proposed annexation to be mailed to the governing body of the district. Such notice shall be sent not less than 10 days before the first public hearing upon such proposed annexation.

SEC. 212. The district may be dissolved in the manner now or hereafter provided for the dissolution of county water districts, excepting Sections 32851.5 and 32858 of the Water Code and excepting that title to any property and moneys shall vest in the land owners of the district in the proportion that the assessed valuation of the land of each bears to the total assessed valuation of all land in the district that is on the county assessment roll at the time of such dissolution. Land and improvements shall mean land. Electors shall mean voters herein.

Article 15. Need for Special Act

SEC. 215. The purpose of this act is to form the Estero Municipal Improvement District in order that the area

benefited may be provided with various municipal improvements. Special facts and circumstances, applicable to the general area within which the district lies and not generally, make the accomplishment of this purpose impossible under existing general laws and therefore special legislation is necessary. The special facts are as follows:

(a) The area has no facilities for the treatment and disposal of sewage and, in its development, will consequently contaminate the waters of the State.

(b) The area is without an adequate water supply, storage and distribution system for public and private purposes.

(c) There is need for small craft harbor facilities in the area and the public interest, economy and general welfare will be served by privately owned facilities of such nature being expedited, and such action will conserve moneys made available by the State for public small craft harbors.

(d) There is urgent need for the improvements which the district is empowered to construct under this act; but other municipal powers which could be exercised by a city are not required, and would result in more government than the area needs or wants.

(e) There are no existing general laws under which the area could be provided with the facilities it needs short of incorporation as a city. Therefore, the only way in which the particular needs of the area can be provided is by special act.

(f) The land in the district is not owned by residents. The owners are the ones primarily concerned with the

district and the ones who will be supporting the district. The owners should therefore hold the voting power. Since no general law district with the necessary powers provides for voting by owners, special legislation is necessary.

(g) The area is of strategic importance during times of war or threatened war. It is strategically located adjacent to the Bayshore industrial complex. Influx of military men and their families during times of war or threatened war greatly increases the necessity of providing municipal facilities.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1412

WALTER S. COOPER, *Plaintiff and Appellant,* vs. LESLIE SALT COMPANY, et al., *Defendants and Respondents.*	California Supreme Court S.F. No. 22,616
WALTER S. COOPER, *Plaintiff and Appellant,* vs. T. JACK FOSTER, et al., *Defendants and Respondents.*	California Supreme Court S.F. No. 22,617
WALTER S. COOPER, *Plaintiff and Appellant,* vs. ESTERO MUNICIPAL IMPROVEMENT DISTRICT, et al., *Defendants and Appellants,* T. JACK FOSTER, et al., *Interveners and Respondents.*	California Supreme Court S.F. No. 22,619

BRIEF OF RESPONDENTS

T. Jack Foster; T. Jack Foster & Sons; T. Jack Foster, Jr.; T. R. Foster; Richard H. Foster; Foster D. Corp.; Foster T. Corp.; Foster J. Corp.; Foster B. Corp.; Midwest Dredging Corp.; Likins-Foster Honolulu Corp.; Lomita Homes Inc.; George A. McQueen

IN OPPOSITION TO

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Brief of Respondents T. JACK FOSTER; T. JACK FOSTER & SONS; T. JACK FOSTER, JR.; T.

R. FOSTER; RICHARD H. FOSTER; FOSTER D. CORP.; FOSTER T. CORP.; FOSTER J. CORP.; FOSTER B. CORP.; MIDWEST DREDGING CORP.; LIKINS-FOSTER HONOLULU CORP.; LOMITA HOMES INC.; and GEORGE A. McQUEEN in Opposition to the Petition of Walter S. Cooper for a Writ of Certiorari to review the judgments of the Supreme Court of the State of California which were made in the above entitled matters on March 20, 1969, is hereby respectfully presented.

OPINIONS BELOW

The Opinion of the California Supreme Court in SF Nos 22616 and 22617 is reported at 70 AC 669 and the Opinion in SF No 22619 is reported at 70 AC 687.

JURISDICTION

The jurisdictional requisites pursuant to 28 USC §1257 are adequately set forth in the petition.

QUESTIONS PRESENTED

In a haphazard and confused fashion, petitioner speaks of four purported "questions" presented for review [Pet 3-4]. Each "question" complains of an unspecified State law imposing a property ownership requirement on franchise as constituting: a denial of equal protection (questions I and II, Pet 3 and 4), a denial of due process (question III, Pet 4), and as a violation of rights under the United States Constitution without further specifica-

tion (question IV, Pet 4). Petitioner also apparently complains of a two year delay in enforcement of full voting rights (question II, Pet 4), the refusal of the State "to compel an accounting from a land developer", and various other contentions which defy translation.

In Petitioners' "Argument" (Pet 14-19), he sets forth *three* issues entitled as follows:

I Constitutionality of the Estero Act [Pet 14];

II Voting Rights of Petitioner [Pet 16];

III Right of Petitioner that the Land Developer Account to the Estero District [Pet 18].

Although each of these purported arguments partakes of the others and includes sundry contentions, best described as "accusations", we shall address our reply to these three entitled issues.

STATUTE INVOLVED

The Estero Act (Stats 1960, 1st Ex Sess 1960, ch 82, 459) is set forth in the Appendix to the Petition and the 1967 amendment thereto insofar as is applicable (Stats 1967, ch 1511, 2695, §§3, 5) is set forth in Appendix A herewith.

STATEMENT

Petitioner seeks review of three judgments, culminating in two opinions, of the California Supreme Court.

In the first opinion (70 AC 669), in consolidated appeals (*Cooper* v *Leslie Salt Co.*, SF 22616, and *Cooper* v

T. Jack Foster, SF 22617), the California Supreme Court affirmed judgments of the Superior Court of San Mateo County dismissing petitioner's complaints following the sustaining of demurrers thereto without leave to amend. Except to the extent discussed in respondents' Argument below, the facts and issues are adequately set forth in the opinion.

In the second opinion (70 AC 687), insofar as is relevant to this proceeding, the California Supreme Court in *Cooper v Estero Municipal Improvement District,* SF 22619, affirmed a judgment of dismissal of the Superior Court of San Mateo County following the sustaining of general and special demurrers to petitioner's second amended petition for mandate. Again, except to the extent discussed in respondents' Argument below, the facts and issues are adequately set forth in that opinion.

ARGUMENT

I. PETITIONER'S POINT I ENTITLED BY HIM "CONSTITUTIONALITY OF THE ESTERO ACT"

Petitioner baldly asserts here that the Estero Act is unconstitutional and that the instant holding of the California Supreme Court should not have enforced the provisions of California Code of Civil Procedure §803, which provides that an action in quo warranto brought by the attorney general of the State "is the only proper remedy" in cases attacking the legality of the existence of an agency of the state government. As the opinion below puts it [p675], under §803 the right to bring an action to

annul the existence of a governmental entity or a district of the State on the grounds that it was invalidly formed or that the statute under which it was formed was unconstitutional "is within the exclusive province of the Attorney General through a quo warranto action", which remedy "is not available to a taxpayer", and "the superior court would not have jurisdiction of an action challenging the lawful existence of a special district unless brought by the Attorney General."

As Petitioner concedes, the basis for jurisdiction of this Court is 28 USC §1257, which permits review

> "(3) By writ of certiorari . . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the *Constitution, treaties or laws of the United States*. . . ." (Emphasis added)

Petitioner, however, ignores these requirements of §1257.

He has failed to inform this Court that his attack on the Estero Act in the California courts was on the ground that "the act itself is void in that it purports to create a corporation for municipal purposes by a special act of Legislature *in violation of article XI, section 6, of the California Constitution.*" (Emphasis added) [See the opinion below, p674.]

Since 1875, the rule of the Supreme Court has been that it does not hear questions of State law, *Murdock* v *City of Memphis*, 87 US 590, 22 LEd 429. The California Supreme Court unanimously denied petitioner's claim that the District was unconstitutionally created under the *State* constitution, because of petitioner's failure to follow the prescribed *State* procedure for the assertion of such a claim.

Although petitioner's argument as to "Constitutionality of the Estero Act" is saturated with allusions to "many constitutional questions" and violations of the "Magna Carta" [Pet 15, 16], his only reference to the United States Constitution is that "since petitioner and other residents must repay the debt incurred by their taxes in the Estero District, the petitioner and other residents of the Estero District are deprived of their property without due process of law by the Estero Act and by the refusal of the California Supreme Court to remedy the improper past and future operation of the Estero District" [Pet 16]. Petitioner cannot now fabricate a federal constitutional question out of the cloth of State law. His failure to raise any federal issue before the California Supreme Court concerning the formation of the District, upon hearing and rehearing is necessarily fatal to his present contentions.

Yakus v *United States* (1944) 321 US 414, 88 LEd 834.

II. PETITIONER'S POINT II ENTITLED BY HIM, "VOTING RIGHTS OF PETITIONER"

A. Introduction.

Petitioner urges that "the most obvious Constitutional defect of the Estero Act is the property qualification for the right to vote" [Pet 16]. In substance, petitioner contends that the Estero Act conflicts with the "one man, one vote" doctrine established by this Court in *Reynolds* v *Sims* (1964) 377 US 533, 12 LEd2 506, and as more recently expounded in *Avery* v *Midland County* (1968) 390 US 474, 20 LEd2 45.

Respondents submit that petitioner's contention is specious. The inapplicability and inappropriateness here of the "one man, one vote" doctrine is apparent upon examination of the origin, purpose, provisions, and development of the Estero Act.

B. The Estero Act.

The Estero Act Municipal Improvement District was organized in 1960 pursuant to a special act of the California Legislature (Cal Stats 1960, 1st Ex Sess 1960, ch 82, 459.) The purpose of the Act was to encourage and make feasible the reclamation of privately owned land by enabling the development of a residential, industrial, and commercial community [§75 et seq]. The implementation of this purpose prompted the enactment by the Legislature [§215]:

> "The purpose of this act is to form the Estero Municipal Improvement District in order that the area benefited may be provided with various municipal improvements. Special facts and circumstances, applicable to the general area within which the district lies and not generally, make the accomplishment of this purpose impossible under existing laws and therefore special legislation is necessary."

In formulating the structure, powers, and duration of the District, the Legislature considered characteristics peculiar to the area. The Legislature observed that the District consisted of undeveloped land belonging to a single owner [§1]. In 1960, the area comprised approximately 418 uninhabited acres [70 AC, 680]. The Act provided [§215(f)]:

> "The land in the district is not owned by residents. The owners are the ones primarily concerned with the district and the ones who will be supporting the district. The owners should therefore hold the voting power. Since no general law district with the necessary powers provides for voting by owners, special legislation is necessary."

Specifically, the Legislature established a governing board consisting of three directors [§26], two of whom would be owners, officers, or legal representatives of owners [§28], the third director being a "public member" appointed by the County Board of Supervisors [§28]. The Act implemented land ownership voting in the incipient District by providing for voting rights to be based on one vote for each dollar of assessed valuation of land [§64].

The Legislature recognized that the District required only *limited* governmental powers and expressly so provided in the Act [§215(d)]:

> "There is urgent need for the improvements which the district is empowered to construct under this act, but other municipal powers which could be exercised by a city *are not required*, and would result in more government than the area needs or wants." (Emphasis added)

However, as the Legislature observed, there existed no general law enabling the District to provide the facilities it required other than incorporation as a city; "therefore, the only way in which *the particular needs* of the area can be provided is by special act" [§215(e)]. (Emphasis added)

Hence, the Act empowered the District to perform minimal municipal functions to protect the life, health, and safety of residents moving in as the land was made ready. The District could construct street lighting facilities, provide for removal of garbage, for distribution of water, create parks, etc. [§§577, 578, 579a] The District was authorized to finance these improvements by special assessment [§93], general obligation bonds [§105], or revenue bonds [§135]. The District can provide a police department to protect and safeguard life and property [§79], but because it is not a county, city, town, or township, it has no general police powers [Cal Const Art XI, §11]. Moreover, the legislative powers of the District are strictly confined to "necessary and proper regulations, not in conflict with the laws of this State, for the removal of garbage and refuse and the supplying of sewage, light, water, storm water and fire and police protection service" [§97].

Unlike a municipality, the District is not authorized to enact criminal ordinances. Nor can it enact building ordinances, license businesses, or regulate traffic. Even as to reclamation, the District's powers are subordinated to the County Board of Supervisors, which determines the amount of reclamation necessary to protect land from tidal action, and designs the location of streets, curbs, drains, watermains, etc.

Succinctly, it is the County Board of Supervisors which retains the general powers of government. The District is only granted those powers necessary to enable it to accomplish the reclamation of land and to make the land habitable during the interim occupancy while the devel-

opment of the community by the District is still going forward.

The District is, by its very nature, temporary government of limited continuity. The Act expressly provides for annexation to a city, incorporation as a city, and for dissolution of the District [§§207-212]. The Legislature has carefully provided for a government responsive to the anticipated increasing residential character of the developing District. Since 1960 the District has grown from 418 uninhabited acres to some 2600 partially reclaimed acres with a population of some 8,000 persons on the reclaimed portion [70 AC, 680, 685]. In 1967 the Legislature amended the Act and provided for enlarging the Board of Directors by two members elected by popular vote of all residents to represent residents, also provided that in 1969 the public member theretofore appointed by the Board of Supervisors would be elected by popular vote; and provided that commencing in 1971 all five members of the governing board would be elected by popular vote of the residents [§§26 and 28, as amended by Cal Stats 1967, ch 1511, §3 and §5]. Since petitioner has failed to advise this Court of the said amendment, respondents attach a copy thereof hereto as Appendix A.

C. The "One Man, One Vote" Issue Is Not Present.

The California Supreme Court did not expressly decide petitioner's proffered "one man, one vote" issue because it found that the Legislature has already made appropriate provision for transfer of voting control from the owners of property to the residents. As previously noted, although ignored by petitioner, two of the five directors of the District are currently elected by residents. In the

election this year (1969) three directors will be subject to general election by all residents, and in 1971 the entire board of five directors will be so elected. It is upon this rational, deliberate, and sensible plan of the Legislature that the California Supreme Court found for respondents, stating [78 AC, 680]:

> "[T]he Legislature has recognized that as the character of the district gradually changes from uninhabited to that of an area with substantial numbers of resident registered voters it is appropriate that the voting power likewise gradually shift. Since the transfer of control from owners to resident voters will be accomplished by the close of 1971, no occasion is shown for interference by this court with the programming spelled out by the Legislature."

This Court in *Dusch* v *Davis* (1967) 387 US 112, 116 18 LEd2 656, 659, recognized where there is legitimate State interest, "an appreciable transition" will be permitted before the "one man, one vote" rule becomes compulsory. The California Legislature has here provided for such a transition in order to achieve the legitimate objective of developing a residential, commercial, and industrial community. Respondents submit that there is no basis for review by this Court under these circumstances.

D. The Estero Act Does Not Violate The "One Man, One Vote" Doctrine.

Contrary to petitioner's contention, the "one man, one vote" doctrine is not shibboleth invalidating State legislation by its mere utterance. The doctrine is an application of the Equal Protection Clause of the Fourteenth

Amendment. The Equal Protection Clause does *not* prohibit a State from discriminating between citizens. As this Court stated in *Avery* v *Midland County* (1967) 390 US 474, 484, 20 LEd2 45, 53:

> "The Equal Protection Clause does not, of course, require that the State never distinguish between citizens, but only that the distinctions that are made not be arbitrary or invidious."

Recently, the Court has further explored the propriety of voter qualifications adopted by a State:

> *Kramer* v *Union School District* (1969) ..... US ....., 37 LW 4530;
>
> *Cipriano* v *City of Houma* (1969) ..... US ....., 37 LW 4598.

In *Kramer,* New York law limited the right to vote in school districts to property owners or their spouses, lessees, or parents or guardians of children attending public school. In reviewing the statute, the Court emphasized that State laws affecting the right of franchise must be given "a close and exacting examination" [37 LW, 4531]. The question before the Court was "whether the exclusion [of a bachelor who lived with his parents] is necessary to promote a compelling State interest" [37 LW, 4532]. It was assumed arguendo that New York could limit the franchise in the school district elections to those "primarily interested in school affairs". Even so, said the Court, "the classifications must be tailored so that the exclusion of appellant and members of his class is necessary to achieve the articulated State goal" [37 LW, 4533]. Upon application of these standards to the statute, it was found that persons who had a distinct and direct

interest in the elections were excluded. In the absence of justification, this failure to sufficiently limit the franchise to those "primarily interested" was fatal to the statute.

In *Cipriano,* the Court examined a Louisiana law which excluded nonproperty owners from voting on public utility revenue bond issues. As in *Kramer,* it was assumed arguendo that Louisiana could limit the franchise to those "primarily interested". However, the Court again found that the classification did not meet the "exacting standard of precision" required of statutes selectively distributing the franchise [37 LW, 4599]. Because the benefits and burdens of the bond issue affected both property owners and nonproperty owners equally, the classification was constitutionally defective.

In the instant case, the Estero Act meets the most exacting constitutional requirements.

We start with the premise that the Act fosters a legitimate public, and therefore State, interest of encouraging the reclamation of theretofore uninhabitable private land. The means chosen by the Legislature to develop a viable community was development by a public district with incidental governmental powers granted only to the extent necessary during the period while the land was being made habitable, so that the projected community could become a reality [See 70 AC, 677].

Special function districts are very common in California. There are more than 100 such districts in California dealing with water problems alone. For example, the California Water District Law created a type of governmental entity for the distribution of water empowered to

exercise eminent domain [Water Code §35625], make rules governing distribution of water [Water Code §35423] and enforce such rules under misdemeanor penalties [Water Code §35424]. The Protection District Act of 1907 (stats 1907, ch 25, 16) provides for districts to protect land from damage by unnavigable bodies of water [§1], and permits the issuance of bonds [§§31-38], taxation [§§41-43], special assessments [§53], exercise of eminent domain [§15], and the power to award mineral and gas leases [§§13.5-13.7]. The Drainage District Act of 1903 (stats 1903, ch 238, 291) creates a governmental entity for the drainage of agricultural lands other than swamp and overflowed lands [§1], with powers analogous to the aforementioned acts.

To administer the Estero District, the Legislature chose a three-man board of directors. Voting rights were accorded only to property owners on the basis of one vote per one dollar of assessed valuation of real property. This was not an "arbitrary" requirement, but one dictated by the existing circumstances and aims.

Significantly, the California Legislature has chosen property ownership as a basis for voting rights in many other special function districts because property-ownership voting is similarly a practical necessity for the functioning of those districts. [For example, California Water District Law, Water Code §35003; Reclamation District Law, Water Code §50016; Drainage District Act of 1903 (stats 1903, ch 238, 291, §7, as amended stats 1941, ch 335, 1575); Protection District Act of 1880 (stats 1880, ch 63, 55, §3, as amended stats 1889, ch 250, 366; stats 1929, ch 587, 990; stats 1957, ch 406, 1256; stats 1966, 1st Ex

Sess ch 16, §27); Sacramento River West Side Levee District (stats 1915, ch 361, 520, §3, as amended stats 1917, ch 673, 1212).]

Application of a "one man, one vote" doctrine would not only be inappropriate to such special function districts, but would be totally destructive of the legitimate State objectives intended to be accomplished. In the Estero District, no investor would procure, reclaim, and develop uninhabited land if upon the sale or lease of one developed parcel he lost control of the project. The absurdity of such a situation is apparent upon the facts of the instant case. Again, it is worth emphasizing that this was the consideration paramount in the Legislature's selection of the basis for voting [§215(f)]:

> "The land in the district is not owned by the residents. The owners are the ones primarily concerned with the district and the ones who will be supporting the district. The owners should therefore hold the voting power. . . ."

It is respectfully submitted that the Estero Act's voting classifications do not conflict with any decision of this Court. The Act survives the "close and exacting examination" demanded by *Kramer*. The District fosters a legitimate State interest. The property ownership requirement is not only necessary to accomplish that objective under the standards of *Kramer* and *Cipriano*, but is indispensable to the intended development of the community.

More significantly, and unlike *Kramer* and *Cipriano*, residents are not precluded from participating in election of directors. Their participation is progressively greater

as development nears completion, and complete voting control in them is already provided for by law. At present they elect two directors, the same number as the property owners; the fifth director being a "public member" appointed by the Board of Supervisors. This balance of voting power, and its progressive, continuous weighting in favor of the residents, is necessitated by the incipient and uncompleted development of the community. At present, only 1400 of the 2600 acres in the District have been developed; the current population of 8,000 persons is far short of the 35,000 intended to be accommodated. With the community at less than 25 percent of its intended population, the residents already have control over the election of directors equal to that of the property owners. By the end of 1969, the residents will elect a majority of the directors, and by the end of 1971 the residents will elect the entire board. This situation is vastly different from that in *Kramer* and *Cipriano* where the disenfranchised persons were totally precluded from voting in the elections.

The Estero Act does not deprive residents of the right to vote. The situation presented to this Court by the Estero Act is one of orderly and reasonable transition, from uninhabited raw land to the development of a complete community. The situation of the voting provisions must be viewed in that context, and in view of the requirements necessary to the achieving of a legitimate State objective. In *Dusch* v *Davis, supra,* the Court wisely recognized that "an appreciable transition period" may be appropriate before the "one man, one vote" rule becomes compulsory.

Respondents submit, as the California Supreme Court found, that "no occasion is shown for interference by this Court with the programming spelled out by the Legislature" [70 AC, 680].

III. PETITIONER'S POINT III ENTITLED BY HIM "RIGHT OF PETITIONER THAT THE LAND DEVELOPER ACCOUNT TO THE ESTERO DISTRICT"

Petitioner complains of the California Supreme Court's unanimous refusal to "compel" respondent T. Jack Foster & Sons to account pursuant to California Civil Code §2235. The California Supreme Court stated five reasons why petitioner had not stated sufficient facts to constitute a cause of action in this regard: (1) Mandamus is not the proper procedure to compel an accounting [70 AC, 692]; (2) Petitioner did not allege he was "suing on behalf of the district" [*ibid*]; (3) Petitioner did not allege that he demanded "the district to request an accounting from the Fosters . . . and that such demand was refused" [*ibid*]; (4) Petitioner himself placed before the California Supreme Court a document indicating that such accounting would be had by agreement of all concerned parties [70 AC, 692-693]; and (5) The audit in fact was completed in November 1967 and exists as a public record of the District [70 AC, 693, fn[3]].

Despite the clear lack of any federal question in this area, petitioner with incredible naivete blandly asserts in his petition here for the first time in these entire proceedings that he was denied "due process of law" by the refusal to compel an accounting [Pet 19].

Succinctly, the California Supreme Court held that petitioner had not stated a cause of action to compel an accounting by these respondents on the asserted grounds of fraud, resting its judgment on the aforesaid five separate procedural and substantive defects and omissions in petitioner's pleading. Even if it be granted arguendo the California Supreme Court was wrong as to this, there still exists no federal ground for review by this Court.

Murdock v *City of Memphis, supra;*
Yakus v *United States, supra.*

CONCLUSION

For the aforementioned reasons the petition for certiorari should be denied.

San Francisco
10 July 1969

Respectfully submitted,
BERT W. LEVIT
Attorney for T. Jack Foster; T. Jack Foster & Sons; T. Jack Foster, Jr.; T. R. Foster; Richard H. Foster; Foster D. Corp.; Foster T. Corp.; Foster J. Corp.; Foster B. Corp.; Midwest Dredging Corp.; Likins-Foster Honolulu Corp.; Lomita Homes Inc.; George A. McQueen, Respondents

LONG & LEVIT
Of Counsel

(Appendix A Follows)

Appendix A

1967 Regular Session

ESTERO MUNICIPAL IMPROVEMENT DISTRICT

CHAPTER 1511

(Assembly Bill No. 984)

An act to amend Sections 20, 21, 22, 26, 28, 29, 55, 57, 58, 59, 61, 63, 64, 65, 68, 106, 161, and 162 of, to add Article 10.5 (commencing with Section 167.1) to, and to repeal Sections 27 and 60 of, the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session), and to amend Section 100 of Chapter 29 of the Statutes of 1967, relating to the Estero Municipal Improvement District, and declaring the urgency thereof, to take effect immediately.

The people of the State of California do enact as follows:

* * *

SEC. 3. Section 26 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 26. The board is the governing body of the district and, commencing with the last Friday in December, 1967, shall consist of five (5) members, one of whom shall be president. The officers of the district are the five members of the board and a secretary. The district may have a finance officer, and other officers as the board may from time to time create.

* * *

SEC. 5. Section 28 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 28. Except as otherwise provided in this section, two directors shall be owners or officers or legal representatives of owners, two shall be registered voters resident within the district, and one shall be a public member designated and appointed by the county board of supervisors. The term of the public member commencing in March, 1968, shall expire on the last Friday of December, 1969, and succeeding terms shall thereafter be filled by nomination and election or appointment pursuant to the Uniform District Election Law by registered voters resident within the district.

Landowner-directors shall be nominated and shall be elected or appointed pursuant to Article 4 (commencing with Section 55) of this act at elections to be held on the fourth Tuesday in March of 1968 and 1970. The terms of the directors elected or appointed at such times shall run until the last Friday in December, 1971. Thereafter, said offices shall be filled by nomination and election or appointment pursuant to the Uniform District Election Law by registered voters resident within the district.

A general district election shall be held on the first Tuesday after the first Monday in November, 1967, pursuant to the Uniform District Election Law for the purpose of filling two offices of director. Such offices shall be filled by and voted upon by registered voters resident within the district and qualified to vote on said date. The two candidates receiving the highest number of votes shall be deemed elected, the one with the highest votes

to serve for four years and the one with the next highest number of votes to serve for two years. All subsequent terms of office filled pursuant to the Uniform District Election Law shall be for four years.

Commencing with the election to be held on the first Tuesday after the first Monday in November, 1971, no person shall be qualified to be elected or appointed to the office of director nor to vote at any district election who is not a registered voter resident within the district.

* * *

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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 1412

WALTER S. COOPER, *Plaintiff and Appellant,* vs. LESLIE SALT COMPANY, et al., *Defendants and Respondents.*	California Supreme Court S.F. No. 22,616
WALTER S. COOPER, *Plaintiff and Appellant,* vs. T. JACK FOSTER, et al., *Defendants and Respondents.*	California Supreme Court S.F. No. 22,617
WALTER S. COOPER, *Plaintiff and Appellant,* vs. ESTERO MUNICIPAL IMPROVEMENT DISTRICT, et al., *Defendants and Appellants,* T. JACK FOSTER, et al., *Interveners and Respondents.*	California Supreme Court S.F. No. 22,619

BRIEF OF RESPONDENTS LESLIE SALT CO. AND SCHILLING ESTATE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

The Brief of Respondents Leslie Salt Co. and Schilling Estate Company in Opposition to the Petition of Walter S. Cooper for a Writ of Certiorari to

review the judgments of the Supreme Court of the State of California which were made in the above entitled matters on March 20, 1969, is hereby respectfully presented.

STATEMENT OF THE CASE

Petitioner Walter S. Cooper seeks review of three judgments which were made in the above entitled matters, only one of which judgments pertains to these opposing respondents, Leslie Salt Co. and Schilling Estate Company, and involves neither representative government nor public financial integrity in the Estero Municipal Improvement District.

The judgment pertaining to, and in favor of, these opposing respondents was entered in the action filed in San Mateo County Superior Court as Action Number 126789 on December 3, 1966, which petitioner characterizes as an action at law for a declaration of the legal effect of the Estero Act and legal remedies against the land developer and for the benefit of the Estero Municipal Improvement District and its taxpayers and residents. These opposing respondents were not the land developer but were nevertheless served in that action as "Doe" defendants. Demurrer was sustained without leave to amend in favor of defendants, respondents herein, Leslie Salt Co. and Schilling Estate Company, after demurrers of the other defendants had been sustained without leave to amend, and a separate judgment in favor of respondents Leslie Salt Co. and Schilling Estate Company was subsequently entered and affirmed on appeal in

Cooper v. Leslie Salt Company, et al., California Supreme Court Number SF No. 22616 disposed of by the decision of said Court, which appears in the Official Advance Sheets as 70 Advance California 669.

These opposing respondents were neither defendants nor otherwise involved in the second action filed by Petitioner in San Mateo County Superior Court as Action Number 127132 on December 20, 1966 in the form of a Petition for a Writ of Mandate. The title and number of this proceeding in the Supreme Court of the State of California was *Cooper v. Estero Municipal Improvement District, et al.*, S. F. No. 22619 and the decision of said Court was rendered on March 20, 1969 and appears in the Official Advance Sheets at 70 Advance California 687.

This Brief of Respondents Leslie Salt Co. and Schilling Estate Company in Opposition to the subject Petition is directed solely to Petitioner's attempt to have this Court review that aspect of the California Supreme Court decision at 70 Advance California 669 affirming the judgment in favor of said respondents. (*Cooper v. Leslie Salt Company, et al.*)

ARGUMENT

I

THE ISSUE REGARDING THE CONSTITUTIONALITY OF THE ESTERO ACT IS NOT PERTINENT TO THESE OPPOSING RESPONDENTS

Petitioner's only alleged cause of action against respondents Leslie Salt Co. and Schilling Estate Com-

pany is contained in his alleged Third Cause of Action of the Complaint as amended, filed in San Mateo County Superior Court Action Number 126789, wherein he alleges that $30,000,000 of the Estero Municipal Improvement District's funds was spent to improve and make salable the real property of the Foster respondents under the claim that said expenditure is authorized as reclamation. Without alleging any specific manner in which public moneys of the District have been applied to private purposes, Petitioner merely asserts in this alleged cause of action that these opposing respondents, Leslie Salt Co. and Schilling Estate Company, as Does IV and V, respectively, received moneys and benefits from the District. Apparently the moneys and benefits were those derived indirectly and incidentally by reason of the fact that deeds of trust were made by T. Jack Foster in favor of these opposing respondents, who were the original owners of some of the land now encompassed within the District, as security for the purchase price of land so purchased from said respondents and that the reclamation of this land necessarily increased the value of this security. This security transaction was the only way in which these opposing respondents were involved in the matters of which Petitioner complains.

Nothing contained in Petitioner's Petition for Writ of Certiorari demonstrates any illegality in this security transaction or how Petitioner could state grounds upon which to base jurisdiction of this Court or otherwise to justify the granting of his Petition as it pertains to these opposing respondents. Likewise, noth-

ing contained in that Petition derogates from or challenges the decision of the Supreme Court of the State of California in *Cooper v. Leslie Salt Company,* 70 Advance California 669 at pages 677 and 678 (1969), with unanimous concurrence, that the reclamation was a proper function of the District and that the general demurrer was correctly sustained as to Petitioner's attempt to allege a taxpayer's cause of action against respondents Schilling Estate Company and Leslie Salt Co. Moreover, Petitioner effectively admits the foregoing at page 6 of his Petition wherein he states that all of the matters of which he seeks review are concerned with the constitutionality, operation, and effect of the special act of the California Legislature which created the Estero Municipal Improvement District. None of these concerns are relevant to the judgment entered in favor of respondents Leslie Salt Co. and Schilling Estate Company.

II

THE "ONE MAN ONE VOTE" ISSUE IS NOT PERTINENT TO THESE OPPOSING RESPONDENTS

The alleged Constitutional defect of the Estero Act's property qualification for the right to vote, of which Petitioner complains, is in no way relevant to the alleged cause of action which Petitioner attempts to state against respondents Leslie Salt Co. and Schilling Estate Company. Obviously, no relief is sought against these respondents with respect to Petitioner's voting rights and therefore the Petition-

er's arguments pertaining thereto need no answer here.

III

PETITIONER'S ACTION TO OBTAIN AN ACCOUNTING FROM THE LAND DEVELOPER IS NOT PERTINENT TO THESE OPPOSING RESPONDENTS

Petitioner states that it was his second action filed in San Mateo County Superior Court as Action Number 127132 on December 20, 1966, in the form of a Petition for a Writ of Mandate (*Cooper v. Estero Municipal Improvement District,* 70 Advance California 687), which sought a mandate of the Superior Court to direct the Estero District to obtain an accounting from the land developer of the financial benefits it received from the District. As mentioned above, respondents Leslie Salt Co. and Schilling Estate Company were neither parties to, nor otherwise involved in, that action. Likewise, these respondents had no control over the land developer or the District's government. If Petitioner has been deprived of his property without due process of law, it was not the result, directly or indirectly, of any action or inaction of these opposing respondents.

CONCLUSION

In light of the foregoing, it is evident that Petitioner has not raised any issues for review by this Honorable Court which pertain to respondents Leslie Salt Co. and Schilling Estate Company or otherwise establish jurisdiction with respect to the issues relevant to said respondents. Accordingly, this Honorable Court should deny a Writ of Certiorari to the Supreme Court of the State of California as it would relate to the decision in *Cooper v. Leslie Salt Company, et al.*, California Supreme Court Number S.F. No. 22616 at 70 Advance California 669.

Dated, San Francisco, California,
June 12, 1969.

Respectfully submitted,
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BRUCE M. CASEY, JR.,
WILLIAM E. TRAUTMAN,
Attorneys for Respondents Leslie Salt Co. and Schilling Estate Company.

CHICKERING & GREGORY,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1412

WALTER S. COOPER, *Plaintiff and Appellant,* vs. LESLIE SALT COMPANY, et al., *Defendants and Respondents.*	California Supreme Court S.F. No. 22,616
WALTER S. COOPER, *Plaintiff and Appellant,* vs. T. JACK FOSTER, et al., *Defendants and Respondents.*	California Supreme Court S.F. No. 22,617
WALTER S. COOPER, *Plaintiff and Appellant,* vs. ESTERO MUNICIPAL IMPROVEMENT DISTRICT, et al., *Defendants and Appellants,* T. JACK FOSTER, et al., *Interveners and Respondents.*	California Supreme Court S.F. No. 22,619

BRIEF OF ESTERO MUNICIPAL IMPROVEMENT DISTRICT, G. C. SHANNON, W. A. INNES, C. W. OLMO, ST. PAUL INSURANCE COMPANIES, and ERNEST A. WILSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Come now the respondents above named and submit to this Honorable Court their brief in opposition to petitioner's petition for writ of certiorari as follows:

I

STATEMENT OF FACTS

In 1960 the California State Legislature passed an Act declaring the creation of the Estero Municipal Improvement District (Stats. 1960, ch. 82). Said Act was entitled "An Act to Create the Estero Municipal Improvement District and to prescribe the boundaries, organization, powers, operation, management, financing, change of boundaries, and dissolution." Said Act is referred to herein as the "Estero Act."

On February 7, 1961 (one RT 159)[1] the District, pursuant to section 121 of the Estero Act, filed an *in rem* action (Superior Ct. No. 93050) in the Superior Court of the State of California entitled "In the Matter of the Validity of the Formation of the Estero Municipal Improvement District by Chapter 82 of Statutes, First Extra Session, 1960, of the State of California; and the proceedings for the authorization of $22,000,000 of Bonds pursuant to said Act". A validating judgment was entered on December 20, 1961. The findings, orders and determinations of said judgment were set forth in 31 numbered paragraphs. A copy of said findings, orders, and determinations are set forth in the *Appendix* to this brief.

---

[1]At this point we will clarify references to the record. There were two cases filed in the Superior Court. The *first* case was *Cooper v. Foster, et al.* The case resulted in two appeals (S.F. 22617 and S.F. 22616) because the defendants were dismissed in two groups. The *second* case was *Cooper v. Estero Municipal Improvement District, et al.* (S.F. 22619).

The *Cooper v. Foster, et al.* appeal record citations will be preceded by the word "one." The *Cooper v. Estero Municipal Improvement District, et al.*, record citations will be preceded by "two."

Nearly five years later, and on December 3, 1966 the petitioner filed the *Cooper v. Foster, et al.* action (one CT 3). Said action was brought by petitioner as a resident and taxpayer of the District. It initially named various "Foster" defendants (T. Jack Foster; T. Jack Foster & Sons; T. Jack Foster, Jr.; J. R. Foster; Richard H. Foster; Foster D. Corporation; Foster T. Corporation; Foster J. Corporation; Foster B. Corporation) and it named the Estero District and its then Board of Directors (G. C. Shannon; W. A. Innes; C. W. Olmo) as defendants. Also as defendants were "Doe One, through Doe One Hundred, inclusive." Several "true names" of Does were later asserted by amendments.

Said complaint was twice amended (one CT 12, 23, 66). A copy of the allegations of said complaint showing all amendments thereto is set forth in the *Appendix* to this brief.

On December 20, 1966, which was 17 days after the filing of the first suit, the petitioner filed the *Cooper v. Estero Municipal Improvement District, et al.,* case (two CT 2). Said second suit, referred to herein as *Cooper v. Estero,* was brought by petitioner as a resident and taxpayer of the District (two CT 2). It named the District and its then Board of Directors (Shannon, Innes, and Olmo) as respondents. Various "Foster" defendants subsequently intervened (two CT 25). The original complaint, a petition for writ of mandate, was twice amended. A copy of the allegations of petitioner's Second Amended Petition (two CT 128) is contained in the *Appendix* to this brief.

On October 27, 1966, the trial court sustained demurrers to petitioner's Second Amended Petition in *"Cooper v. Estero,"* the second case (two CT 345B), and on October 30, 1966, dismissed the case (two CT 346-347).

On January 26, 1967, the trial court sustained demurrers to the second amended complaint in *Cooper v. Foster, et al.,* the first case, and dismissed the "Foster" defendants, the District, and its then Board (one CT 67, 72-73). Several remaining "Doe" defendants, whose "true" names had been added, were later dismissed.

With the above as a basic background, we will turn to a consideration of petitioner's arguments. Before doing so, it should be noted that petitioner refers to matters allegedly contained in a "Cross-Complaint of Defendant in Intervention Walter S. Cooper" (at pages 11-13 of petitioner's Petition herein). Such cross-complaint was never properly before the California courts (see opinion in *Cooper v. Estero,* 70 AC at 691) and petitioner conceded such before the California Supreme Court (70 AC at 691). Petitioner doesn't assert error as regards said California Supreme Court's ruling upon said cross-complaint, and, thus, we will exclude any reference to said cross-complaint in discussing petitioner's contentions before this Court.

Finally, any further facts needed to fill out the case will be set forth as needed in the arguments to which they pertain.

II

ORDER OF ARGUMENTS PRESENTED

Petitioner presents three arguments entitled "Constitutionality of Estero Act" (at 14-16 of his petition); "Voting Rights of Petitioner" (at 16-18 of said petition); and "Right of Petitioner that the Land Developer Account to the Estero District" (at 18-19 of said petition).

To avoid repetitious explanations, said arguments will be considered in the following order: (1) the "accounting" argument, (2) the "constitutionality" argument, and, finally, (3) the "voting" argument.

III

THE "ACCOUNTING" ARGUMENT

A. Pertinent facts

The accounting argument relates to the second suit, that is, the *Cooper v. Estero* case. As noted above, the Second Amended Petition in that case (the pleading upon which a judgment of dismissal was rendered) is contained in the *Appendix* to this brief.

A review of said Second Amended Petition shows that it contained six counts. The "accounting" claim relates to count one of said pleading.

The California Supreme Court addresses itself to said count one of *Cooper v. Estero* (70 AC 687) at pages 692-693 of their opinion thereon. The court states, at 692:

> Plaintiff apparently views the first cause of action as one for an accounting. *Any such action must be predicated upon the theory that plaintiff is suing on behalf of the district.* Even if such an action by a taxpayer be considered tenable, *the petition does not allege that plaintiff is suing on behalf of the district, nor is it alleged that he made a demand upon the district to request an accounting from the Fosters* (see 1 Cal.Jur.2d 426) *and that such a demand was refused.* (Emphasis added.)

Thus, the Court's decision was predicated upon the failure to allege facts essential to raising the issue. That is, the claim was defectively pleaded.

B. No Federal question

Rules of pleading and practice in state courts are considered as binding on federal courts unless the decision was rendered in a spirit of evasion for the purpose of defeating the claim of a federal right (*Nevada-California-Oregon Railway v. Burres,* 37 SCt 576, at 577, 244 US 103). A state is free to regulate the procedure of its courts in accordance with its own concepts of policy and fairness unless in so doing it offends some principle of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental (*Synden v. Commonwealth of Massachusetts,* 54 SCt 333, at 335, 291 US 97; *Twining v. New Jersey,* 29 SCt 14, at 21, 211 US 78; *Rogers v. Peck,* 26 SCt 87, at 89, 199 US 425).

The rule that a prior demand must be made upon the entity is a well settled rule. It is the general rule

that a demand upon the proper public officer to bring suit is a condition precedent to the maintaining of a taxpayers' action (52 Am.Jur., *Taxpayers' Actions*, at 17). The primary right of suit is with the officers of the entity (*Hansen v. Carr*, 73 CA 511, at 515, 238 P 1048; *Keith v. Hammel*, 29 CA 131, at 135, 154 P 871). A failure to allege that such a demand has been made has long been recognized as a grounds for general demurrer (*Hansen v. Carr, supra*, at 514-515).

By failing to allege a prior demand on the entity, or at least some excuse for not doing so, petitioner failed to comply with established pleading and practice rules of this state. Thus, his claim never arose to the level of presenting a federal question. The same could be said of petitioner's failure to allege that he was suing on the entity's behalf rather than directly on his own behalf (see, *Wilson v. Loews*, 78 SCt 526, 355 US 597).

Finally, a review of said count one will show that petitioner never asserted any violation of his rights under our federal constitution. That is, he never pleaded that his right to an accounting was based on the U. S. Constitution or that the failure to grant an accounting would violate any right given by the U. S. Constitution. Therefore, additionally, no federal question was timely raised (*Atlantic Coast Line R. Co. v. Mims*, 37 SCt 188, at 189, 242 US 532).

It might be noted, finally, that petitioner finds no fault with the pleading and practice rules asserted by the California Supreme Court in ruling on his accounting claim.

The "accounting" argument presents no federal question.

IV

THE "CONSTITUTIONALITY" ARGUMENT

Petitioner's "constitutionality of the Estero Act" argument (Petition, at pp. 14-16) is concerned with the first case, that is *Cooper v. Foster, et al.*, and the Opinion of the California Supreme Court thereon (70 AC 669, at 672-687).

A careful reading of petitioner's argument discloses that he apparently misunderstands the holding of the court.

Petitioner seems to find in the opinion a holding that "the effect of the ruling of the court is apparently to make the Estero District . . . . immune from any assertion of constitutional rights by petitioner and other taxpayers" (petition, at p. 15). Such is, of course, not the holding of the court.

Simply put, the Opinion merely holds that a *private person* cannot attack the *existence* of the District once the proceedings for the formation of the District have been completed; that the only person who can attack the *existence* of a completed District is the state attorney general by the route of *quo-warranto*. The material on the limitations of a private person's rights to attack the *existence* of such a public entity is set forth at 70 AC 669, at 675. The application of the limitation of attacks on the district's *existence* on

claimed constitutional defects in the forming statute is set forth at 70 AC 669, at 676. On this latter point the court states, at 676:

> The court considered that because there was no valid statute under which the purported corporation could have been created, no de facto corporation could exist. *But later cases have held that without regard to the claimed unconstitutionality of any statute, it is only where proceedings to create a district have not been fully completed that a private citizen can question their validity.* (*Alden v. Superior Court* (1963) 212 Cal.App.2d 764, 769-770 [28 Cal.Rptr. 387]; *City of Colton v. City of Rialto* (1964) 230 Cal.App.2d 174 [40 Cal. Rptr. 766]; *Hazelton v. City of San Diego* (1960) 183 Cal.App.2d 131, [135] [6 Cal.Rptr. 723]; [see also *Yorty v. Anderson* (1963) 60 Cal.2d 312, 316 [33 Cal.Rptr. 97, 384 P.2d 417]].) (Emphasis added.)

Since the rule is that a *private* person may *not* attack the *existence* of a public corporation once it is completely formed, it makes no difference what the *reasons* are which are asserted as a basis of the attack. If such *reasons* might form a basis for attacking the existence of a public corporation, still, they can only be asserted by the attorney general.

The Opinion *does not* say that a person cannot now or in the future attack the constitutionality of the Estero Act as it applies to that person, all it says is a private person cannot attack the *existence* of the district by asserting a constitutional defect in the forming statute.

This Court has, itself, recognized the limits upon a private person's right to proceed where only the government by quo warranto can proceed *(Wallace v. Anderson,* 5 Wheat 290, at 290; *Territory v. Lockwood,* 3 Wall 236, at 236-237; *Newman v. U. S. ex rel. Frizzell,* 35 SCt 881, 238 US 537).

A few final comments will close this argument. *First,* the petition makes some comment on the court's holding in regard to the above referred to validation judgment (petition, at p. 14) of 1961. The holding of the court is set forth at 70 AC 669, at 676. The court merely holds the validation judgment as another grounds of preventing an attack upon the District's existence, for it is said, at 676:

> In the present case, the prior validation judgment declared that the district was validly created. The district's existence is thus not subject to the attack here attempted.

Such a ruling is proper *(Ivanhoe Irrigation Dist. v. All Persons,* 47 C2d 597, at 606, 306 P2d 824; *Sutphin v. Speik,* 15 C2d 195, 99 P2d 652). The petition (at p. 15 of the Petition) confuses a *"Validating Act"* with a "Validation Action." Since we are *not* here concerned with a Validating *Act,* but rather an *in rem* Validation Judgment, his point about Validating Acts is not in point. *Second,* the court passed on petitioner's attempt to attack the District's existence by the route of declaratory relief (at 70 AC 669, at 676-677). The court properly stated that the declaratory relief statute in California wasn't designed to undermine the policy of the quo warranto statute.

In conclusion, petitioner has misread the court's rulings on quo warranto and the validating judgment. The court did *not* hold that they precluded all future attacks on the constitutionality of the statute; all the court held was that they precluded an attack by a *private* person on the District's *existence*. The court didn't hold that the petitioner or other persons couldn't raise the constitutionality of any part of the statute as it applies to them. *In fact the court took a careful look at the roughly pleaded property voting claim of petitioner.*

V

THE VOTING RIGHTS ARGUMENT

A. Introductory facts

At the time of the filing of the herein actions, the Estero Act provided for a Board of Directors having three members (Section 26). One of the three directors was an appointee of the County Board of Supervisors (Section 28) and the remaining two were to be elected by a vote of property owners of the District with one vote for each one dollar ($1) in assessed valuation of property owned (Section 64).

After the actions were dismissed, the Legislature of the State increased the number of Directors to five (5). Two of the Directors were to be elected by *registered voters* resident within the District, two were to be elected by a vote of property owners, and one an appointee of the County Board of Supervisors. After 1969 the "appointee" shall be elected by *registered*

voters resident within the District. After 1971 all five directors shall be elected by *registered voters* resident within the District.

Such changes were made by Statutes 1967, Chapter 1511. A copy of said statute is included within the *Appendix* to this brief.

Petitioner finds constitutional fault with the property qualifications for voting and, also, with the procedure set up by the Legislature as aforesaid changing the vote over to *registered voters*. Petitioner thinks the procedure is too slow.

B. Respondents' contentions

Respondents contend (1) that petitioner has no standing to raise the question sought to be raised, (2) that property qualifications for voting in special purpose districts is not violative of the constitutional rights of non-property owners, and (3) that, in any event, in the subject District the legislature has made provision for the transfer of voting qualifications from property qualifications to registered voter qualifications.

C. Petitioner has no standing

In both cases *(Cooper v. Foster* and *Cooper v. Estero)* the petitioner asserted that he was representing a class of "taxpayers" and "residents" of the District and that *he* was a member of said class (see the pleadings set forth in the *Appendix* to this brief).

Petitioner did *not* assert that he was a *voter, a registered voter, an elector,* or that he would have a right

to vote if the property qualifications for voting were removed. *His status* and the *status of the class* he assertedly represents is that of *residents* and *taxpayers.* Petitioner thus failed to assert a status which will give him standing to assert the voting question before this court.

It should be noted that the elimination of the property qualifications for voting wouldn't throw the vote open to "taxpayers" or "residents", but would put the voting in the hands of "electors" under Article II section 1 of our State Constitution. Differently stated, "taxpayers" and "residents" as such are not voting classes in this state under our constitution. "Residents" and "taxpayers" are groups containing persons of all ages, including minors and other disqualified persons. *Being a resident or a taxpayer doesn't establish one as being an eligible voter.*

It should be noted that *neither* of the Opinions in *Cooper v. Foster* or *Cooper v. Estero* hold that petitioner or the class petitioner represents would be eligible to vote in any election. They merely state that petitioner is a resident and a taxpayer.

It is fundamental that a person can't challenge the constitutionality of a statute unless he is within the class whose constitutional rights are allegedly infringed (*Barrows v. Jackson*, 73 SCt 1031, at 1035, 346 US 249; *New York ex rel. Hatch v. Reardon*, 27 SCt 188, at 190, 204 US 152; *Jeffrey Mfg. Co. v. Blagg*, 35 SCt 167, at 169, 235 US 571). A person can't claim standing solely for the purpose of vindi-

cating the rights of some third parties *(Barrows v. Jackson, supra,* 73 SCt 1031, at 1034, 346 US 249). The petitioner must allege facts showing disadvantage *to him* as an *individual* in order to have standing to sue *(Baker v. Carr,* 82 SCt 691, at 704, 369 US 202). He must show that the alleged unconstitutional feature injures *him (Heald v. Dist. of Columbia,* 42 SCt 434, at 435, 259 US 111; *First National Bank of Shreveport v. Louisiana Tax Comm.,* 53 SCt 511, at 513, 289 US 60).

A person who desires to question the constitutionality of a Statute as regards voting is in no position to impugn the constitutionality of such statute where he fails to allege that he is a qualified voter *(Wiley v. Sinkler,* 21 SCt 17, at 21, 179 US 58).

In *Baker v. Carr, supra,* 82 SCt 691, at 703, 369 US 202, the petitioners alleged that they were qualified to vote and that they sued on behalf of qualified voters. In *Smiley v. Holm,* 52 SCt 397, at 397, 285 US 355, petitioners were "electors." In *Koenig v. Flynn,* 52 SCt 403, at 403, 285 US 375, they were "voters." In *Wood v. Broom,* 53 SCt 1, at 1, 287 US 1, they were "qualified electors." In *Grey v. Saunders,* 83 SCt 801, at 801, 372 US 375, the action was by a qualified voter. In *Cipriano v. City of Houma,* No. 705—October Term 1968, decided June 16, 1969 (Respondent has no citation other than the above) the appellant was a "duly qualified voter."

Here petitioner has not alleged that he or his group are qualified voters and would be eligible to vote if the property qualifications for voting were removed. He

thus has no standing to assert the voting question attempted to be asserted by him.

D. Voting argument—merits

Assuming for the purpose of argument that petitioner has standing to assert the matter, still, his voting rights claim is non-meritorious and presents no substantial federal question. Such can be shown by reviewing the pertinent facts, analyzing petitioner's contentions, and considering the basic nature of Special Districts. Such we will now do and in that order.

(1) Pertinent facts

A review of the Estero Act, the pleadings in the cases, the Validation Judgment, and the Opinions of the California Supreme Court discloses substantially, at least for orientation purposes, the essential nature of what has occurred at Estero.

In summary, the formation of the Estero District was for the purpose of reclaiming and improving lands located in the San Francisco Bay and lying at bay level. Such lands were, prior to the formation of the District, protected by a levee from inundation by the ebb and flow of the tide and in such condition were substantially useless for anything else but limited farming.

As stated in the Opinion in *Cooper v. Foster* (70 AC 669, at 680), at the time the District was formed the area was *uninhabited*. The District's project encompassed the reclamation of the District's lands by filling so as to bring such lands to a state of readiness wherein it would be susceptible to the receiving of

streets, sewer, drainage, lighting facilities, and water facilities and being subdivided into homesites. Further, being located on the Bay where numerous small boats abound, provision was made for the creation of a small craft harbor and attendant facilities. The financing of such improvements was to be accomplished by the sale of bonds; and the payment of such bonds was to be made by charges levied on the property within the District.

At the time the present actions were filed, substantial reclamation had been done (the complaint in *Cooper v. Foster* alleged $30,000,000, but actually, the total amount spent on all improvements at that time was in the neighborhood of $54,000,000, such monies being received from the sale of general obligation and special assessment bonds) and the reclaimed area had been subdivided into homesites and homes built thereon and sold (at such time the project was only partially completed—work was still underway and substantial completion was scheduled for the early 1970's).

As stated above, at the time the District was formed and for some time thereafter there were no inhabitants in the District area. At the time of the formation of the District, the Estero Act provided that the Board of Directors of the District would be made up of three (3) persons. Two (2) of such persons were to be landowners or their representatives, and one (1) of such persons was to be an appointee of the County Board of Supervisors. Also, said Act provided that the two property owner-Directors were to be elected

by a vote of the landowners with voting being in proportion to the assessed value of the property owned.

In 1967, after the dismissal of the subject actions, the State Legislature amended the Estero Act to provide for a transition of voting rights from the landowners to *registered voters resident within the District* (Stats 1967, chapter 1511). A copy of said amending statute is contained in the *Appendix* to this brief. Said amendment increased the number of Directors to five (5). Two (2) of said Directors were to be *registered voters resident within the District* and were to be elected by *registered voters resident within the District*. One (1) was still to be appointed by the Board of Supervisors of the County; but after December, 1969, said member was to be a *resident registered voter* and be elected by *resident registered voters*. Two (2) were still to be property owners elected by property owners; but after December, 1971, said Directorships were to be filled by *resident registered voters* and elected by *resident registered voters*.

Because of the process of reclamation, subdivision, and sale, there are now a large number of *homeowning property owners* and their families in the District. Each homeowner's property, of course, is burdened with its proportional share of cost of the project. Such homeowners' faith in and reliance upon the ultimate completion of the project and their willingness to buy homes based on such faith is, of course, that which has made the project so far successful and possible. Such homeowners are vitally interested in the timely and successful completion of the project as

planned. Any faltering or delay in completing the project as scheduled could cause them substantial losses resulting from increased bond interest charges during periods of delay. A successful completion of the project will operate, of course, to spread the costs and taxes over a wider base and avoid possible defaulting of the outstanding bonds (see the Complaint in Intervention of the Foster City Community Association, at two CT 182).

(2) Petitioner's contentions

A survey of petitioner's voting argument (Petition for Writ, at 16-17) shows that he objects to the *timetable* set up by the Legislature for transferring the voting power from property owners to resident registered voters.

It should be noted that *the 1967 amendment to the Estero Act rendered* as *moot* any *argument over being denied a vote under the original Act*. Said voting provisions of the original Act became inoperative shortly after the dismissal of the subject lawsuits.

Petitioner's contention, apparently, is that there should be no transition period; that the property owners' vote should be taken away immediately and all voting immediately turned over to resident registered voters. That is, he objects to the "delay until late 1971 in the enforcement of the 'one man one vote' principle" (Petition for Writ, at 17).

(3) Voting argument—discussion

One thing is certainly clear: *At the time the District was formed* there were *no inhabitants* of the

District. Therefore, regardless of what might be the rule had there been inhabitants, it is clear that *at the time of the formation of the District there was no equal-protection objection to a property owner vote qualification.*

The project envisioned (and envisions) a gradual transfer, by the sale of homes, of the area from a one owner situation to a multiple homeowner situation as the project goes from its beginning to its completion; and, thusly, the "resident" situation would gradually change from a no-resident to a multiple-resident condition as the project goes from initiation to completion.

Now it could hardly be argued that the Legislature had to turn the whole operation of the District over to the first registered voter who took up residence in the District.[2] In a gradually changing situation, as was here presented, it is reasonable to provide for a gradual transfer (assuming that such a transfer is proper in the first place). Since the number of residents will increase proportionally with the rate of project completion, it is reasonable to relate the two and tailor the transfer to project completion. Such is substantially what was done it seems. The situation presented to the Legislature was reasonably unique, and the Legislature could reasonably, it seems, devise

[2]No one has raised the issue whether the Legislature can constitutionally exclude property owners of a special District from voting in Special District affairs. The discussion of the nature of Special Districts set forth hereafter shows that the property owners are *the* prime substantially interested group in a Special District. It's assumed, for the purpose of this case, but not conceded, that such is proper.

a procedure designed to handle the problems presented.

Keeping in mind the injuries which the homeowners could suffer from project delays, and keeping in mind the large amount of monies involved, and keeping in mind that the people who were on the Board were knowledgeable from years of experience in all phases of the project, and keeping in mind that an all new inexperienced Board of uninformed persons might be elected if a total transfer was ordered, and keeping in mind the need for an orderly and timely completion of the project, and keeping in mind that the improvement aspect of the project is grounded upon the ability to sell and continue to sell bonds and that a smooth running project and a capable Board are essential to maintain the respect of bond buyers in this type of project, keeping such things in mind, the State Legislature could reasonably find it *necessary* to provide for a gradual transition in authority rather than an abrupt change. No violence is, or was, done to the principles laid down in *Kramer v. Union Free School District No. 15* or in *Cipriano v. City of Houma*[3] by the procedure adopted by the legislature in meeting the problem before it; and no substantial federal question is presented.

Before moving on, the question here sought to be raised is a *voting qualifications* problem rather than a one man—one vote problem. The one man—one vote

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[3]These two cases were decided on June 16, 1969. Both were October Term 1968 cases. *Kramer* is No. 258 and *Cipriano* is No. 705 of that Term.

principle (*Baker v. Carr*, 82 SCt 691, 369 US 202; and *Avery v. Midland County*, 88 SCt 1114, 390 US 474), dealing as it does with dilution of the vote through mal-apportionment of elected bodies, concerns a different aspect of equal protection than that involved in voting qualification cases. Thus, no discussion thereof is provided herein.

(4) Voting in special districts

The above materials actually handle the rather narrow issues presented by the present Petition for Writ. But, Special Districts are so numerous and have brought about such a great amount of worthwhile public improvements that when a question is raised as regards some fundamental aspect of their operation, such as voting, more is required than just a narrow approach to the problem. One should have some idea of the arena in which he is working.

A consideration of the nature of Special Districts will show that property owner voting is proper. That is, Special Districts present the situation wherein a true and correct voting distinction may be made upon the relative interests involved. Or differently put, the *property owner* status presents a *substantial* interest: a *resident status*, constitutionally, presents merely a *coincidental, general, and insubstantial* interest.

To begin with, Special Districts are of many types. There are, for examples, Public Utility Districts, Flood Control Districts, Water Storage Districts, Fire Protection Districts, Water Conservation Districts,

Soil Conservation Districts, Drainage Districts, Water Replenishment Districts, Mosquito Abatement Districts, Irrigation Districts, Reclamation Districts, Lighting Districts, Sanitation Districts, Swamp Land Districts, Police Protection Districts, Municipal Improvement Districts, Sewer Districts, and Highway Districts. There are many others.

Such Districts may be created directly by a special act of the Legislature (*Chesebro v. Los Angeles County Flood Control District,* 59 SCt 622, 306 US 459; *Branson v. Bush,* 40 SCt 113, 251 US 182), or, they may be, and such is the usual case, created under general laws by local boards such as County Boards of Supervisors (*Embree v. Kansas City & L.B.R. Dist.,* 36 SCt 317, 240 US 242).

It may be noted at this point that a proper qualification for voting in the affairs of such Districts is the rule (see, for example, *Hagar v. Reclamation District No. 108,* 4 SCt 663, at 664, 111 US 701; *People v. Reclamation District No. 551* (Cal), 117 C 114, at 122, 48 P 1016; *People v. Sacramento Drainage District* (Cal), 155 C 373, at 389, 103 P 207; *Potter v. Santa Barbara* (Cal), 160 C 349, at 355, 116 P 1101; *Tarpey v. McClure* (Cal), 190 C 593, at 606, 213 P 983; *Barber v. Galloway* (Cal), 195 C 1, at 11, 231 P 34; *People v. Milan* (Colo), 5 P2d 249, at 251-254; *People v. Parker* (Colo), 192 P2d 417, at 418-422; *Board of Directors v. Peterson* (Or), 128 P 837, at 839-840; *In Re North Unit Irr. District* (Or), 187 P. 839, at 839; *Mann v. Gibbs* (N.Car.), 72 SE 82, at 83; *State v. Knott* (Mo), 75 SW2d 86, at 89; *State v.*

Patterson (Iowa), 70 NW2d 838, at 839; *In Re Walker River Irrig. District* (Nev), 195 P 327, at 330-332; *Davy v. McNeill,* (N.Mex), 240 P 482, at 488-489; *State v. Hansen* (Neb), 117 NW 412, at 414; *State v. Hansen* (Neb), 115 NW 294, at 298; *Pickard v. Cross* (Ky), 165 SW2d 986, at 987; *Mound City Land & Stock Co. v. Miller* (Mo), 70 SW 721, at 727; *Bethune v. Salt River Valley W.U.A.* (Ariz), 227 P 989, at 992).

The basic and fundamental characteristic of a Special District is that it is a "special benefit" District *(Embree v. Kansas City & L.B.R. District, supra,* 36 SCt 317, at 320, 240 US 242; *Chesebro v. Los Angeles County Flood Control District, supra,* 59 SCt 622, at 624, 625, 306 US 459). The drawing of the boundaries of such Districts and the inclusion of property therein are based on the concept that the property included will be *specially benefited* by the works, improvements, and services constructed or rendered by the District.

The creation of a Special District operates to carve out of a State or County an area of *property,* which area of property will be *specially* taxed or charged to pay for the improvements and services provided by the District. It is a matter of substantive due process that in order to justify the charging of a particular area for such improvements and services, rather than the County or State as a whole, that said area of properties must receive special benefits from such improvements distinct from the general benefits derived therefrom by the State or County as a whole. The

theory is recognized in many cases. As good a case as any, and because it has collected many of the pertinent authorities on the subject, is *Chesebro v. Los Angeles County Flood Control District, supra,* 59 SCt 622, at 624-625, 306 US 459. The following quotation from *Chesebro* and the cases cited therein sufficiently explain the matter:

> In the absence of flagrant abuse or purely arbitrary action, the State, consistently with the federal constitution, may establish local districts *to include real property that it finds will be specially benefited by drainage, flood control, or other improvements therein,* and, to acquire, construct, maintain and operate the same, may impose *special tax burdens upon the lands benefited. Hagar v. Reclamation District,* 111 U.S. 701, 704, 705, 4 S.Ct. 663, 665, 28 L.Ed. 569; *Spencer v. Merchant,* 125 U.S. 345, 355, 8 S.Ct. 921, 926, 31 L.Ed. 763; *French v. Barber Asphalt Paving Co.,* 181 U.S. 324, 342, 21 S.Ct. 625, 631, 45 L.Ed. 879. And see *Houck v. Little River Drainage District,* 239 U.S. 254, 262, 36 S.Ct. 58, 60, 60 L.Ed. 266. And where, within the scope of its power, the legislature *itself has found that the lands included in the district will be specially benefited by the improvements,* prior appropriate and adequate inquiry is presumed, and the finding is conclusive. *Parsons v. District of Columbia,* 170 U.S. 45, 52, 18 S.Ct. 521, 523, 42 L.Ed. 943; *Phillip Wagner, Inc. v. Leser,* 239 U.S. 207, 218, 36 S.Ct. 66, 69, 60 L.Ed. 230; *Withnell v. Ruecking Const. Co.,* 249 U.S. 63, 69, 69 S.Ct. 200, 201, 63 L.Ed. 479; *Hancock v. City of Muskogee,* 250 U.S. 454, 458, 39 S.Ct. 528, 530, 63 L.Ed. 1081; *Branson v. Bush,* 251 U.S. 182, 189, 190, 40 S.Ct. 113, 115, 64 L.Ed. 215;

Valley Farms Company v. Westchester County, 261 U.S. 155, 162, et seq., 43 S.Ct. 261, 262 et seq., 67 L.Ed. 585; *Milheim v. Moffat Tunnel Imp. Dist.,* 262 U.S. 710, 721, 43 S.Ct. 694, 698, 67 L. Ed. 1194. But *where the district* was *not directly created by the legislature* and there has been no determination by it that their property will be benefited by the local improvements *the owners are entitled, under the due process clause of the Fourteenth Amendment, to be heard by* some officer or tribunal empowered by the State to hear them and to consider and decide whether their lands *will be specially benefited. Fallbrook Irrigation District v. Bradley,* 164 U.S. 112, 167, 17 S. Ct. 56, 66, 41 L.Ed. 369; *Embree v. Kansas City & Liberty Boulevard Road Dist.,* 240 U.S. 242, 247, 36 S.Ct. 317, 319, 60 L.Ed. 624; *Browning v. Hooper,* 269 U.S. 396, 405, 406, 46 S.Ct. 141, 143, 70 L.Ed. 330.

The *Chesebro* case involved a Special District created by a Special Act of the Legislature (as is Estero).

As noted in *Chesebro,* where the State Legislature creates the district, the question of benefits to the included property is handled by way of a conclusive presumption; on the other hand, where the District is created pursuant to general laws by a County Board of Supervisors or the like, *each property owner,* without regard to his status, be he a corporation, private individual, resident, or non-resident, must be afforded notice and an opportunity to be heard on whether his property should be included—that is, whether his property will be benefited by the undertakings of the proposed District.

Thus, it is the fundamental nature of Special Districts that they are formed of *property* specially benefited, they are operated for the improvement and protection of such *property,* the charges levied by such district are against *property,* and the constitutional basis upon which said charges are levied is that they pay for the improvements and protections provided such *property.*

The formation and operation of a Special District looks *not* to *who* owns the property or whether there are *residents* upon it. The purpose of the District, and the constitutional basis upon which it is formed and operated, is the improvement, protection, and betterment of *property;* its purpose is not to serve the interests of residents as such but, instead, the interests of property owners. Residents, like the public generally, may receive some general benefits from the formation and operation of the District, but such benefits are purely *coincidental* and *non-special* and, therefore, not a constitutional consideration as regards the formation and operation of the District. Likewise, residents, like the public generally, may be affected by the formation and operation of a district; in fact, since the formation and operation of a District changes a given existing situation, it is almost inevitable that they will be affected; but such affects, again, are not a constitutional consideration in forming or operating a Special District. *The* constitutional consideration in the forming and operating of a Special District is *not* its general benefits for or coincidental affects on *persons,* but, instead, the benefits

and effects which the formation and operation of the district will have on the *property* included therein (see *Chesebro* and cases cited therein).

It should be carefully noted that it may happen that property within a given District is subdivided and developed, or property may be reclaimed, subdivided, and developed, thus giving rise to a *greater* number of property owners in the District, and perhaps, a greater number of residents. Such occurrences do not change the basic nature of the District or its purposes. Districts are formed, as stated, on the basis of including benefited properties; they are formed without regard to the number of residents therein at the time of formation. The formation of a District is neither constitutionally prohibited nor constitutionally authorized by the number of residents located in the District area. If the *property* sought to be included in a Special District is *not* specially benefited by the proposed District's operations, such District can*not* be formed *regardless* of the number of residents therein, be they many or a few. On the other hand, if such property *is* specially benefited, then it can be included and the District *can* be formed regardless, again, of the number of residents in the proposed area.

It is therefore patent that there is a *substantial* and distinct difference between a District property owner status, on the one hand, and a resident status on the other (some property owners, of course, are also residents). The property owner status is legally deemed to be the status which makes a person *the* interested

party to the formation and operation of the District (see *Chesebro, supra,* and cases cited therein). All other statuses are, constitutionally, only coincidentally involved, if involved at all. At this point a statement from *People v. Milan* (Colo), 6 P2d 249, a property voting case, is pertinent, at 251:

> It may be said that acts in this state concerning irrigation districts were enacted *to enable those interested in the development and increased productivity of their lands to organize public and quasi municipal corporations* for the purpose of securing water for irrigation, and to provide ways and means of applying that water to the soil. *Upon those interested and benefited the burden must necessarily fall; and it is reasonable to assume that these interested parties should, within certain limits, be the ones most vitally concerned with the economic problems and the efficient administration of the district.* The legislative department has recognized this principle of self-government, with reference to irrigation districts, and has accordingly prescribed certain qualifications for those who participate in the economic and elective matters of the district. (Emphasis added.)

California, of course, has also considered the matter, and reference to several California cases will provide the tenor of this state's approach to the problem.

First is *People v. Reclamation District No. 551, supra,* 117 C 114, at 123-124, 48 P 1016. In that case the court was called upon to decide whether property owner voting in the District before it violated a Cali-

fornia Constitution provision prohibiting a property qualification for voting. The court states:

> In my opinion, these latter districts are not municipal corporations, and no one is a voter in the sense of the constitutional provisions. Certainly, there can be no electors when there are no residents within the district. The district, as already said, was part of a scheme for conducting a public work, and not for self-government. In regard to street work and other local improvements, it has often been provided that the work shall only be done upon the application of the owners of a majority of frontage, or of a certain proportion of the owners of land; and, if the law had provided that the owners could elect a committee of their number to superintend the work, I do not see how it could change the principle. This could not constitute an exercise of the elective franchise, which is the matter to which the constitutional provisions have reference. *The general public has an interest in the reclamation of swamp and overflowed land. Nevertheless, it is one of those public enterprises which results in a benefit to private lands, and therefore the cost is made a charge upon such land. That those who are specially interested and who must pay for the improvement are heard upon the question as to whether it shall be done, and are permitted to appoint those who shall superintend it, is not unusual, nor would it constitute an exercise of the elective franchise.* (Emphasis added.)

The above California case was reaffirmed and followed in *Tarpey v. McClure*, 190 C 593, at 606, 213 P 983; and *Barber v. Galloway*, 195 C 1, at 11, 231 P 34. In

the latter case the court, at 12, upheld the right of a corporate property owner to vote:

> The matter of voting at elections of the character involved here is not the exercise of the right of suffrage in the ordinary sense (*People v. Reclamation District,* 117 Cal. 114 [48 Pac. 1016]; *Tarpey v. McClure,* 190 Cal. 593 [213 Pac. 983].) And, obviously, *a voice in the organization, the selection of the officers, and the issuance of bonds, of districts of the character under consideration here, which materially affect the property of the corporation, is a legitimate concern of corporate ownership.* (Emphasis added.)

Also, property owner voting in Special Districts is not without recognition by this U.S. Supreme Court. In *Hagar v. Reclamation No. 108,* 4 SCt 663, 111 US 701, a case out of California, the District was initiated by a property owners' petition (4 SCt, at 664). When the petition was granted, the property owners were required to establish by-laws "*and to elect three of their number to act as a board of trustees to manage the same*" (4 SCt, at 664).

See also the case of *Wurts v. Hoagland,* 5 SCt 1086, at 1090, 114 US 606, wherein the drainage commissioners were elected by landowners.

In summary, it is clearly discernible, considering the clearly established constitutional basis and justification for their creation and operation, that the property owner status is the status that gives a person a substantial interest in the District; and other statuses, such as a resident status, are coincidental

and insubstantial in the District's formation and operation. From the standpoint of substantial and insubstantial interests, the legislature, in line with the due process clause, can properly, and should, distinguish between property owners and non-property owners as regards who should choose the officers of the District.

Wherefore, it is respectfully submitted that the petitioner's petition for Writ of Certiorari be denied.[4]

Dated, San Mateo, California,
July 15, 1969.

WILSON, JONES, MORTON & LYNCH,
By ROBERT G. AUWBREY,
JOHN E. LYNCH,
FRANK PIOMBO,
Attorneys for Respondents Estero Municipal Improvement District, G. C. Shannon, W. A. Innes, C. W. Olmo, St. Paul Insurance Companies, and Ernest A. Wilson.

(Appendix Follows)

[4]Petitioner raises no issues and makes no comments in regard to the Respondent, St. Paul Insurance Companies, or in regard to Respondent, Ernest A. Wilson. Any extended comments concerning how such Respondents came to be in the case would be a waste of time and effort, since Petitioner raises no issues in regard to them. As to such two Respondents the herein petition for writ should be dismissed without question.

APPENDIX ITEM No. 1

ALLEGATIONS OF PETITIONERS COMPLAINT AS AMENDED BY FIRST AND SECOND AMENDMENTS IN COOPER v. FOSTER, ET AL., 70 AC 669

Note: Additions made by the first amendment are preceded by one (1) asterisk; additions made by second amendment are preceded by two (2) asterisks

* * * * * * *

"FIRST CAUSE OF ACTION

Plaintiffs complain of defendants and for their first cause of action allege:

I

Plaintiffs are members of a group of persons all of whom are residents of the area of land commonly known as Foster City, San Mateo County, California, are taxpayers therein, and have a common and identical interest in the subject matters of this complaint. The total number of said persons exceeds one hundred and it is impractical to bring all of said persons before the Court as individual plaintiffs, and therefore the named plaintiff, Walter S. Cooper, brings this action as a representative suit for and on behalf of himself and all other persons in said group.

II

The true names or capacities, whether individual, corporate associate, or otherwise, of defendants named herein as Doe One through Doe One Hundred, inclusive, are unknown to plaintiffs who therefore sue said defendants by such fictitious names, and plaintiffs

will amend this complaint to show the true names and capacities when the same have been ascertained.

*Plaintiff having discovered the true name of the defendant sued herein as Doe One to be Midwest Dredging Corporation, hereby amends the complaint by inserting such true name in the place and stead of such fictitious name wherever it appears in said complaint.

*Plaintiff having discovered the true name of the defendant sued herein as Doe Two to be Likins-Foster Honolulu Corporation, hereby amends the complaint by inserting such true name in the place and stead, of such fictitious name wherever it appears in said complaint.

**Plaintiff having discovered the true name of the defendant sued herein as Doe Three to be Lomita Homes, Inc., hereby amends the complaint by inserting such true name in the place and stead of such fictitious name wherever it appears in said complaint.

**Plaintiff having discovered the true name of defendant sued herein as Doe Seventy-Four to be St. Paul Insurance Companies, hereby amends the complaint by inserting such true name in the place and stead of such fictitious name wherever it appears in said complaint.

III

On or about May 11, 1960, at the instance and request of defendants T. Jack Foster and T. Jack Foster & Sons, there was enacted by the Assembly

and Senate of the State of California, and approved by the Governor of the State of California, a certain special law entitled "An act to create the Estero Municipal Improvement District and to prescribe its boundaries, organization, powers, operation, management, financing, change of boundaries, and dissolution." Said act purports to create a political subdivision of the State of California, but does not do so because it is in violation of the Constitution of the United States of America and the Constitution of the State of California.

IV

Said act is in conflict with the Constitution of the State of California in that, among other things, it violates Article II, Section 6 of the Constitution of the State of California, which states:

> 'Corporations for municipal purposes shall not be created by special laws.'

Said act purports to grant powers of a municipality and certain of the defendants have expended monies collected under the name of the purported Estero Municipal Improvement District for municipal purposes, namely, providing all of the services of a city to Foster City, and said action was enacted and is employed for municipal purposes.

SECOND CAUSE OF ACTION

Plaintiffs complain of defendants and for their second cause of action allege:

I

Plaintiffs re-allege and incorporate herein by reference each and every allegation of their first cause of action herein above set forth.

II

Numerous rights and obligations of the parties to this action and others depend upon the determination of the validity or invalidity of the terms and conditions of said act of the legislature and there is an actual controversy between the plaintiffs and the defendants in regard thereto.

III

*Defendants Doe Fifty-one through Doe Seventy-five are persons not residing in the Estero Municipal Improvement District whose rights and duties with relation to the subject matter of this action should be determined herein.

Wherefore, plaintiffs pray a declaration of this Court regarding whether said act and said purported political subdivision, Estero Municipal Improvement District, are valid or invalid, and constitutional or unconstitutional.

THIRD CAUSE OF ACTION

Plaintiffs complain of defendants and for their third cause of action allege:

I

Plaintiffs re-allege and incorporate herein by reference each and every allegation of their first cause of action herein above set forth.

II

About $30,000,000.00 of funds belonging to said purported District have been spent to improve and make saleable the real property of defendants T. Jack Foster, T. Jack Foster & Sons, T. Jack Foster, Jr., J. R. Foster, Richard H. Foster, Foster D. Corporation, Foster T. Corporation, Foster J. Corporation, and Foster B. Corporation under the claim that said expenditure is authorized as reclamation under the said act when said District is not lawfuly formed as a reclamation District and when said expenditure was not in fact for reclamation but rather for the improvement of dry private land of said defendants.

III

Said defendant T. Jack Foster & Sons have so dominated and controlled said Estero Municipal Improvement District that it has no existence independent of said T. Jack Foster & Sons and has been used to promote and finance the real estate development activities of said T. Jack Foster & Sons and only incidentally for public purposes. Said T. Jack Foster & Sons through said domination and control have

secured for themselves the power to control and administer the book-keeping of said District for a compensation from said District and have obtained other valuable contracts, privileges and benefits from said District through said control and domination to the loss of said District thereby causing said District a money loss the exact amount of which is not known at this time. By virtue of said control and domination said T. Jack Foster & Sons have obtained great private monetary advantage for themselves and the defendant Foster D, J, T, and B, Corporations which should be restored by them or by the defendants G. C. Shannon, W. A. Innes and C. W. Olmo to the said purported Estero Municipal Improvement District. Said monetary advantage was conferred upon said defendants without authority of law.

IV

*Defendant Midwest Dredging Corporation, sued herein under the fictitious name of Doe One, is a Delaware Corporation which has designated T. Jack Foster as its agent for the service of process within the State of California, and which was formerly qualified to do business within the State of California.

V

*Defendant Midwest Dredging Corporation, sued herein under the fictitious name of Doe One, and Likins-Foster Honolulu Corporation, sued herein as Doe Two, and Doe Three through Doe Ten, have received monies and benefits from Estero Municipal Im-

provement District as a result of the domination and control of said district by said T. Jack Foster & Sons, which should justly be restored to said Estero Municipal Improvement District.

VI

*As a result of said domination and control, including control over disbursements of said Estero Municipal Improvement District by the individual and corporation Foster defendants, said defendants are subject to all the duties and obligations of fiduciaries toward said Estero Municipal Improvement District.

VII

*It has been necessary for plaintiff Walter S. Cooper to retain and employ attorneys to bring this action on his behalf and on the behalf of all others similarly situated, in order to secure reimbursement to the District of monies unlawfully expended and to protect the funds of said District from further unlawful expenditure.

VIII

**At all times herein mentioned defendant Midwest Dredging Corporation was a Delaware corporation owned and controlled by T. Jack Foster & Sons. Said corporation was organized on July 31, 1961, and was thereafter admitted to do business in California until September 1, 1964, when its right to do business in California was forfeited for failure to pay state taxes.

IX

**At all times herein mentioned W. A. Innes was a director of the Estero Municipal Improvement District and was also an agent and employee of T. Jack Foster & Sons, acting in the course and scope of said agency and employment. Plaintiff has been informed by a former officer of the Associated Dredging Company of Sausalito, and believes, and upon said information and belief alleges, that said W. A. Innes caused the Associated Dredging Company to submit statements and bills to the Estero Municipal Improvement District during the period from November 10, 1961, through November 23, 1962, and that during the same time said W. A. Innes caused the Estero Municipal Improvement District to issue twenty-two checks totaling $860,218.05 to the name of Associated Dredging Company with the intention and plan that said checks would not be for the benefit of Associated Dredging Company, but would be endorsed payable to Midwest Dredging Corporation.

**Said checks were in fact issued at said time for said amount and were in fact endorsed payable to Midwest Dredging Corporation and deposited into the account of said Midwest Dredging Corporation. Said deposits were in addition to $1,667,183.80 obtained by said Midwest Dredging Corporation as a result of claims made by it against said District.

**Said W. A. Innes, as agent and employee of said T. Jack Foster & Sons, intentional and falsely represented to said Estero Municipal Improvement District, and indirectly to plaintiffs, by causing the filing

of said purported bills and statements by said Associated Dredging Company, that said Associated Dredging Company was seeking payments of money from said Estero Municipal Improvement District.

**Said representations were false and said bills and statements were caused by W. A. Innes to be presented by said Associated Dredging Company to said Estero Municipal Improvement District so that said T. Jack Foster & Sons could obtain monies from Estero Municipal Improvement District without making lawful claim therefor. Said W. A. Innes knew that said representations were false.

**Said representations were made with the intention to deceive the Estero Municipal Improvement District, the public, and plaintiffs as to the true recipient of the monies, and to enable T. Jack Foster & Sons to obtain $860,218.05 without filing any claim or statement therefore.

**Said Estero Municipal Impovement District, acting for the plaintiff taxpayers, relied upon said statements and bills as being genuine statements and bills of said Associated Dredging Company and made payment thereon to their damage in the sum of $860,218.05.

**Plaintiffs did not discover said misrepresentations until Friday, December 16, 1966, when their attorneys, James W. Funsten and David B. Caldwell, found the endorsements upon the back of the cancelled checks of the District. The meaning of said endorsements was not ascertained until former officials

of Associated Dredging Company had been contacted. Said T. Jack Foster & Sons, through said W. A. Innes, have used their control of said District to conceal the said transaction in the records of the District.

Wherefore, plaintiffs pray judgment that the sum of $30,000,000.00, or such sum as appears to have been spent for the advantage of the Foster defendants without lawful authority be restored by the defendants T. Jack Foster & Sons and the individual Foster defendants, and the Foster corporation defendants, and said G. C. Shannon, W. A. Innes and C. W. Olmo to said Estero Municipal Improvement District, and for liens to secure payment thereof.

Plaintiffs pray judgment for costs against the Foster defendants and for an award from the funds recovered for the Estero Municipal Improvement District of such sum as the Court deems reasonable as fees for the attorneys for the plaintiffs and for an award of a reasonable sum to said attorneys if their services result in the preservation of any funds for the said District which otherwise would have been unlawfully disbursed.

FOURTH CAUSE OF ACTION

Plaintiffs complain of defendants and for their fourth cause of action allege:

I

Plaintiffs reallege and incorporate herein by reference each and every allegation of their First and Third Causes of Action hereinabove set forth.

II

Defendants G. C. Shannon, W. A. Innes and C. W. Olmo threaten to continue to expend monies of said purported district to improve and benefit the lands of said defendants T. Jack Foster & Sons, the individual Foster defendants and the corporate Foster defendants, and to extend special privileges and benefits to said defendants, all without lawful authority, and will do so unless they are restrained.

III

Defendants G. C. Shannon, W. A. Innes and C. W. Olmo threaten to continue to levy the taxes of said purported district without apportioning the burden thereof in accordance with the benefit conferred on the land assessed by the expenditures of the district, unless they are restrained from doing so.

IV

Defendants G. C. Shannon, W. A. Innes and C. W. Olmo threaten to continue to give the management, custody, and control of the books and book-keeping (sic) of the ESTERO MUNICIPAL IMPROVEMENT DISTRICT to said T. JACK FOSTER & SONS without authority in law, unless restrained from doing so.

V

Unless said defendants are restrained from said conduct plaintiffs will suffer irreparable injury, and said plaintiffs have no remedy at law.

Wherefore, plaintiffs pray judgment restraining and enjoining defendants G. C. Shannon, W. A. Innes and C. W. Olmo from expending monies of said purported Estero Municipal Improvement District without lawful authority for the benefit of the FOSTER defendants and their lands, from attempting to tax the plaintiffs in an unfair and unlawful manner, and from permitting the defendants Foster to dominate and control the activities of the said district and its bookkeeping, and from otherwise conducting the affairs of the purported Estero Municipal Improvement District for the private and special benefit of the defendants Foster.

Dated: December 1, 1966.

/s/ Walter S. Cooper
As a plaintiff and on behalf
of all other plaintiffs
/s/ James W. Funsten
Attorney for plaintiffs
/s/ David B. Caldwell
Attorney for plaintiffs

APPENDIX ITEM No. 2

THE COURTS' "FINDINGS, ORDERS AND DETERMINATIONS" OF VALIDATION JUDGMENT RENDERED IN SUPERIOR COURT ACTION No. 93050, SAN MATEO COUNTY

A judgment was entered in the aforesaid validation action on December 20, 1961. Said judgment first recites that the Court heard proofs of the allegations of the petition, examined on oath witnesses for petition, and received documentary evidence. The judg-

ment then sets forth the Court's findings, orders and determinations in 31 numbered paragraphs, as follows:

"1. This proceeding was brought pursuant to Section 121 of the Estero Municipal Improvement District Act of the State of California to determine the validity of the creation of the Estero Municipal Improvement District; the right of its officers to hold and perform the duties of their offices; and the proceedings for the authorization of $22,000,000 Reclamation Bonds of the District by the election held December 20, 1960.

2. Summons herein was duly published as required by law and the order of this Court at least once a week for three (3) weeks, to-wit: February 8, 1961; February 15, 1961; and February 22, 1961, in the San Mateo Times, a newspaper of general circulation published in the County of San Mateo, the county where this action is pending, and which was designated by this above-entitled Court as the newspaper in which said summons was to be published.

3. Ten (10) days have elapsed since the completion of the publication of the summons herein and no one has appeared to contest the validity of said proceedings.

4. All allegations set forth in the petition for validation herein are true.

5. An action in rem brought pursuant to Section 121 of the Estero Municipal Improvement District Act is a proper remedy to determine the validity of the creation of the District, the right of its officers

to hold and perform the duties of their offices and the validity of and right to issue bonds which have been duly authorized.

6. The Act does not violate Article IV, Section 25, Sub-division 19 of the State Constitution which prohibits the passage of local or special laws granting to any corporation, association or individual any special or exclusive right, privilege or immunity.

7. No corporation, association or individual has been granted any special or exclusive right, privilege or immunity by the enactment of the Act nor does the Act empower the granting of such right, privilege or immunity.

8. The improvements contemplated by the Act are public improvements of the type which tend to enlarge the resources, increase the industrial energies, and promote the productive power of a considerable number of the inhabitants of a section of the state and lead to the growth of towns and the creation of new sources for the employment of private capital and labor and thus indirectly contribute to the general welfare and to the prosperity of the whole community.

9. Any benefit to the landowner from the enactment of the Act is merely incidental to the public benefit gained from the exercise by the state of its plenary powers relative to water, drainage, health and the general welfare.

10. The fact of ownership of all of the lands within the boundaries of the District by a single landowner

whether corporate or individual, does not change the nature of the benefits to be received by the availability of the Act from public to private.

11. The Act does not violate Article IV, Section 25, Sub-division 33 of the State Constitution since at the time of the adoption of the Act, there was no general law in existence providing for the formation of municipal improvement districts nor granting any public district without electors the combination of powers granted to the District.

12. The area encompassed by the Act represents a unique legislative problem and the accomplishment of the legislative purpose was impossible under existing general laws.

13. The Act does not violate Article IV, Section 31 of the State Constitution by lending or authorizing the lending of public credit to an individual, association, municipality, or other corporation.

14. A separate and distinct public purpose is achieved by the Act, which is one within the constitutional powers of the legislature to bring about; any use of the credit of the District to effectuate its purpose is incidental and is not a violation of the prohibition against the lending of public credit.

15. The exercise by the District and its Board of Directors of the powers granted by the legislature, relative to the authorization, issuance and sale of bonds are for the public benefit and not for the promotion of the interests of the owner or owners of land within the District.

16. The ownership of land is an independent act not motivated by the power to designate legal representatives to serve as directors nor does the electoral control granted by the Act augment the rights of a landowner but rather tends to inhibit the previously existing right to improve or utilize land as he might see fit.

17. The Estero Municipal Improvement District Act does not violate Article I, Section 24 of the State Constitution prohibiting the establishment of property qualifications for the right to vote.

18. The formation of special function districts is a purely legislative function and the Legislature may give those persons it thinks best the opportunity to be heard; such hearing may properly be given to the owners of land as those most interested in the activities of the District.

19. All acts and proceedings had for the creation and organization of the District are legal and valid and the District is duly and legally created and organized and now exists and has since its creation existed under the Estero Municipal Improvement District Act, and the Act is a valid law.

20. The District is validly operating under the laws of the State of California.

21. The members of the Board of Directors of the District were validly appointed by the Board of Supervisors of the County of San Mateo pursuant to Sections 27 and 63 of the Act and have duly qualified.

22. The election directed to be held pursuant to Section 27 of the Act is a general election, within the meaning of Section 61, for the purpose of appointment of Directors in the absence of nominations.

23. The designation by the corporate owner of legal representatives to hold office as Directors subsequent to those persons' appointment but prior to their taking of office was sufficient for all purposes to qualify the appointees as required by Sections 61 and 63 of the Act.

24. The officers of the District and each of them are de jure officers, possessed of the right to hold and perform the duties of their offices, and to hold their offices until the election or appointment and qualification of their successors, and all actions taken and proceedings conducted by said officers since their appointment and qualification are valid, legal and binding.

25. All proceedings for the authorization and leading up to the issuance of the $22,000,000 Reclamation Bonds of the District have been taken in strict compliance with the Act and said bonds have been validly authorized by the election held December 20, 1960, within the District.

26. All acts, conditions and things required by law to exist, happen and be performed precedent to the issuance of the bonds authorized at said election, have existed, have happened and have been performed in due time, form and manner as required by law, and the petitioner is now authorized, pursuant to each and every requirement of law, to issue said bonds.

27. Petitioner may lawfully sell all of said bonds, and said bonds, when sold and delivered, and the interest coupons thereto attached will be valid, binding, legal obligations of the petitioner, in accordance with their tenor and the proceedings pursuant to which they are issued.

28. The monies to be received from the sale of said bonds may lawfully be used for the acquisitions and improvements to be undertaken and of the expenses incidental thereto, as set forth in the propositions submitted to the voters of the District.

29. Said bonds and all of said proceedings are free from any error, irregularity or omission which affects or would affect any substantial right of any person.

30. It is not necessary that this Court appoint an attorney under the provisions of the Soldiers and Sailors Relief Act to represent any defendant or defendants who might be in the military service of the United States.

31. That judgment for the petitioner be, and the same is hereby, ordered entered in accordance with and pursuant to this judgment."

APPENDIX ITEM No. 3

ALLEGATIONS OF SECOND AMENDED PETITION IN COOPER v. ESTERO MUNICIPAL IMPROVEMENT DISTRICT, ET AL., 70 AC 687

"SECOND AMENDED PETITION

First Cause of Action

Petitioner Walter S. Cooper, for himself and all other Taxpayers of the Estero Municipal Improvement District, as his First Cause of Action, alleges:

I

Petitioner Walter S. Cooper is one of a group of persons all of whom are residents of the Estero Municipal Improvement District and Taxpayers therein, and all of whom have a common and identical interest in the subject matter of this petition. The total number of said persons exceeds one thousand and it is impractical to bring all of said persons before the Court as individual petitioners, and therefore the named petitioner, Walter S. Cooper, brings this action as a representative action for and on behalf of himself and all other persons similarly situated.

II

The Estero Municipal Improvement District Act, under which the Estero Municipal Improvement District is claimed to have been created and to now exist, provides that the District shall be governed by three Directors, one of whom is appointed by the Board of Supervisors of the County of San Mateo and the other two of whom shall be elected by the owners of real property within the District, each owner to have one vote for each dollar of assessed valuation.

At all times since the creation of the District, and at the present time, more than two thirds of the real property within the District, by assessed valuation, has been owned either directly or indirectly, by T. Jack Foster & Sons. At all times since the creation of the District, and at the present time, respondent W. A. Innes has been the comptroller of the T. Jack Foster & Sons organization and has received his entire salary from said T. Jack Foster & Sons and has been one of the three Directors of the District. At all times since the creation of the District, and at the present time, respondent G. C. Shannon has been a former employee of the T. Jack Foster & Sons organization and a representative of the T. Jack Foster & Sons organization as one of the three Directors of the District. For more than four years past and at the present time respondent C. W. Olmo has been a Director of the District and a business associate of T. Jack Foster & Sons. Said C. W. Olmo has received substantial benefits from the T. Jack Foster & sons organization as a real estate broker and also as the cement contractor on the building which is owned by T. Jack Foster & Sons and subleased to the Estero Municipal Improvement District at a rental of $2800.00 per month for its offices.

During most of the time the Estero Municipal Improvement District has existed T. Jack Foster & Sons, for a compensation, has performed the bookkeeping and financial functions of the District, and have controlled and disbursed its monies.

At all times since the creation of the Estero Municipal Improvement District and at the present time

the Estero Municipal Improvement District and all of its financial transactions have been completely controlled and directed by T. Jack Foster & Sons. Said T. Jack Foster & Sons have admitted in open Court that they have controlled the financial transactions of said District at all said times.

III

On or about July 31, 1961, T. Jack Foster & Sons caused the incorporation of the intervenor Midwest Dredging Corporation in the State of Deleware, (sic) with a capitalization of $10,000, and entirely owned by T. Jack Foster & Sons. On August 16, 1961, said Midwest Dredging Corporation was qualified to do business within the State of California. On the next day, August 17, 1961, after what is described in the Estero Municipal Improvement District Official Bond Statement as 'considerable negotiations', Midwest Dredging Corporation was awarded a contract with Estero Municipal Improvement District. Between November 20, 1961, and May 14, 1963 the Estero Municipal Improvement District paid to said Midwest Dredging Company $1,667,183.00 on claims made by Midwest Dredging Corporation. All dredging equipment was supplied without cost by said Estero Municipal Improvement District and actual work was performed by Associated Dredging Company of Sausalito. During the same period of time Estero Municipal Improvement District issued checks totaling more than $968,821.81 to Associated and all but $58,603.76 of this sum was deposited to the account of Midwest Dredging Corporation after endorsement by Associ-

ated Dredging Company of Sausalito. Thereafter more than $400,000 of these funds were disbursed to Likens Foster Honolulu Corporation, a corporation owned by T. Jack Foster & Sons.

During the first three months of 1961, alone, the District disbursed over $330,000 of its public monies to T. Jack Foster & Sons upon the claim that said sums were reimbursement of expenditures for the benefit of the district. The vouchers or bills upon which the payments were made do not include evidence from which it can be determined that the expense was for the benefit of the District and expenses of such questionable nature as Diner's Club bills of T. Jack Foster & Sons employees and a hotel bill of personel (sic) registered at the hotel as an employee of T. Jack Foster & Sons were claimed against the District by T. Jack Foster & Sons. Large amounts of the claims paid to T. Jack Foster & Sons have been for reimbursement of expenses occurring before the existence of the District.

IV

Since the creation of the District millions of dollars of public monies of the District have been spent in placing earth fill on the dry land of the District and grading that fill to within four inches of a mean level and compacting that fill to 90% compaction to bring the land to Federal Housing Administration building standards. Said work has been done at public expense upon the lands of T. Jack Foster & Sons, so that T. Jack Foster & Sons have been able to sell

said land to contractors for construction without spending any of their own funds upon filling, grading or compacting.

V

T. Jack Foster & Sons have caused the Estero District to purchase from T. Jack Foster & Sons land, some of which was remnants of subdivision sales and had no substantial value. Said T. Jack Foster & Sons have caused the said Estero District to pay to T. Jack Foster & Sons prices for said remnants equal to the prices paid for useful subdivision land, and without making any allowance for the cost to the District of filling, compacting and grading said land.

T. Jack Foster & Sons have received $900,000 from the State of California for sale to the State of land which was filled, compacted and graded at the public expense of the District and has not reimbursed the District for any said expense although the land is now off the tax rolls and no longer available as a source of income of taxes to repay the debt incurred by the public for its improvement.

VI

T. Jack Foster & Sons have acquired benefits, in addition to those set forth above, at the expense of the Estero Municipal Improvement District in that, among other things, the District has paid the attorneys for T. Jack Foster & Sons $4,000 for services rendered to and for the benefit of T. Jack Foster & Sons, have been regularly subletting office space in a

building owned by T. Jack Foster & Sons for $2,800 when necessary and proper space may be obtained for less than half of that sum, and have been disbursing many thousands of dollars directly to T. Jack Foster & Sons.

VII

At all times that T. Jack Foster & Sons have been obtaining the financial benefits above referred to from the Estero Municipal Improvement District, T. Jack Foster & Sons have controlled the financial affairs of said District and have therefore been a trustee for the District, but T. Jack Foster & Sons have refused the demands of petitioner for an accounting of the benefits received by T. Jack Foster & Sons from the Estero Municipal Improvement District.

Wherefore petitioner prays for an Order, Judgment and Decree of this Court that:

1. T. Jack Foster & Sons make an accounting of benefits received by T. Jack Foster & Sons, and its wholly owned subsidiaries, from the Estero Municipal Improvement District showing all amounts received by said T. Jack Foster & Sons and its subsidiaries, grounds or reasons for each disbursement from the Estero District to T. Jack Foster & Sons.

2. Should T. Jack Foster & Sons not be directed to make such an accounting or fail and refuse to do so, said Estero Municipal Improvement District cause an investigation to be made of the disbursements to T. Jack Foster & Sons, and report to this Court thereon.

Second Cause of Action

Petitioner Walter S. Cooper, for himself and all other Taxpayers of the Estero Municipal Improvement District, as his Second Cause of Action, alleges:

I

Petitioner refers to paragraphs I and II of his First Cause of Action herein and by reference makes them a part hereof.

II

From January 1, 1967 to June 15, 1967, while no dredging was being done, the Estero Municipal Improvement District paid Hydraulic Dredging Company $438,286.61, including weekly payrolls of Hydraulic Dredging Company exceeding $1,000 each week. When Hydraulic Dredging Company was under subpena in this action to testify regarding its transactions with Estero Municipal Improvement District it refused to reveal the contents of its ledger showing the Estero Municipal Improvement District financial transactions. Its dealings with Estero Municipal Improvement District were not the result of a contract by public bidding, but were the results of negotiations conducted while the district was under private control. Said transactions have not been audited by any person acting for the benefit of the taxpayers.

Wherefore, petitioner prays for an Order, Judgment and Decree upon its Second Cause of Action providing that:

1. Said Estero Municipal Improvement District obtain an accounting to show how Hydraulic Dredg-

ing Company has disbursed the funds which have been paid to it by Estero Municipal Improvement District and what value was given for those funds.

Third Cause of Action

Petitioner Walter S. Cooper, for himself and all other Taxpayers of the Estero Municipal Improvement District, as his Third Cause of Action, alleges:

I

By the provisions of the Estero Municipal Improvement District, Act and section 193 thereof, where the Estero District has appointed a Depositary, which they have, there must be a fiduciary or honesty bond upon the finance officer or officers, for the sum of $250,000.00. Until December 31, 1966, such bonds were provided by the St. Paul Insurance Companies, but they did not renew. The Estero Municipal Improvement District stated on June 27, 1967, that the Estero Municipal Improvement District did not then have such a bond on its premises and it refused to inform Petitioner the nature and terms of any existing honesty bond held by the District. Petitioner is informed and believes that the Estero Municipal Improvement District no longer carries a fiduciary bond in compliance with Section 193 of the Estero Municipal Improvement District Act.

Wherefore, Petitioner prays judgment, decree or order that the Estero Municipal Improvement District either make proof that it has a fiduciary bond in compliance with Section 193 of the Estero Act or

place its funds into the hands of some other Government body which has such fiduciary bonds.

Fourth Cause of Action

Petitioner Walter S. Cooper, for himself and all other Taxpayers of the Estero Municipal Improvement District, as his Fourth Case of Action, alleges:

I

As shown by the July 6, 1967, Official Bond Statement of the Estero Municipal Improvement District, at page 13, the said Directors of the Estero Municipal Improvement District have taken $135,000 of the public Park monies and placed them in the "Reclamation" fund. Since said transaction additional interest payments have been made and additional disbursements have been made to Hydraulic Dredging Company from said "Reclamation Fund", though no dredging has been done. Further additional interest payments will become due upon reclamation bonds within the next six months which will exceed the amount of the "Reclamation Funds" which are on hand. Unless it is restrained from so doing, it is likely that the Estero District Directors will remove additional funds from other Bond Funds for transfer to the "Reclamation Fund", all in violation of law, unless restrained from so doing.

Wherefore, petitioner prays judgment, order and decree that the Estero Municipal Improvement District Directors replace the $135,000 taken from the Park Fund and cease and desist transferring or dis-

bursing any monies from any fund except for the purposes lawfully authorized by the election or purported election authorizing the sale of bonds to create the fund.

Fifth Cause of Action

Petitioner Walter S. Cooper, for himself and all other Taxpayers of the Estero Municipal Improvement District, for his Fifth Cause of Action, alleges:

I

According page 13 of the Estero District Official Bond Statement of July 6, 1967, as of April 30, 1967, $4,596,952.27 of the sale proceeds of Estero District bonds had been spent for payment of interest on Estero District bonds. The same statement shows that the Estero District plans to pay $2,012,000 for "interest and other expenses" from proceeds of water and sewer bonds being sold and $6,323,000 from the proceeds of other bonds for interest in the years after 1967. According to the resolution of the Board of Directors of the Estero District, $2,400,000, or more than 25% of the current bond issues, will be used to pay interest on these and prior bonds within the next twelve months. The election, or purported election authorizing the issuance of said bonds did not authorize their use for payment of interest on prior outstanding bonds.

Wherefore petitioner prays a judgment, order, or decree directing that none of the proceeds of bond sales be used for payment of interest on prior existing bonds.

Sixth Cause of Action

Petitioner Walter S. Cooper for himself and for all other Taxpayers of the Estero Municipal Improvement District, as his Sixth Cause of Action, alleges:

I

Petitioner refers to each and every paragraph of his First Cause of Action and incorporates the same herein by reference.

II

By reason of the control of T. Jack Foster & Sons over the Estero Municipal Improvement District financial affairs, said T. Jack Foster & Sons is in the law a trustee for Estero Municipal Improvement District.

III

The Estero Municipal Improvement District is using public funds to improve the lands of T. Jack Foster & Sons with the understanding that T. Jack Foster & Sons will complete a development of those lands.

IV

It is therefore a reasonable subject of public inquiry to determine whether T. Jack Foster & Sons are financially able to fulfill their obligations as such trustee and as such developer.

V

T. Jack Foster & Sons has failed to provide detailed financial information to Dun & Bradstreet and

to other persons, although requested to do so, and presently the United States Government claims that T. Jack Foster & Sons is indebted to it for unpaid Federal Income Taxes in more than $1,000,000 and this claim has been upheld by the United States Tax Court. T. Jack Foster & Sons continues to owe Leslie Salt Company $3,736,689.00 for the purchase of part of the lands which have become the Estero District. Petitioner is informed and believes that additional millions are owed to Schilling Estate Company by T. Jack Foster & Sons for the purchase of these lands.

VI

It is improper for the Directors of the Estero Municipal Improvement District to spend further public monies upon the lands of T. Jack Foster & Sons, as they intend to do, if said T. Jack Foster & Sons is unable to complete the development of those funds, when the District is in the control of T. Jack Foster & Sons.

VII

The Estero District has already spent more money for the development of T. Jack Foster & Sons land than was originally planned, and it is doubtful that there will be sufficient value after improvement to yield taxes for repayment of interest and bonds unless capital is invested by T. Jack Foster & Sons.

Wherefore, petitioner prays Judgment, Order and Decree that Estero Municipal Improvement District obtain a detailed current financial statement from T. Jack Foster & Sons and a detailed statement of the

plans of T. Jack Foster & Sons showing the capital to be invested by T. Jack Foster & Sons and the ultimate sources of taxes for repayment of the bond debt, before the District expends any further funds for the benefit of T. Jack Foster & Sons or their lands, and furthermore, petitioner prays that Estero District be directed to pay the attorneys fees and costs of petitioner should the Court determine that the funds of the District have been recovered or protected by this action.

FUNSTEN & CALDWELL,
Attorneys for Petitioner
By /s/ James W. Funsten
James W. Funsten"

APPENDIX ITEM No. 4

A COPY OF ACT OF 1967, CHAPTER 1511, AMENDING ESTERO ACT OF 1960, CHAPTER 82

CHAPTER 1511

An act to amend Sections 20, 21, 22, 26, 28, 29, 55, 57, 58, 59, 61, 63, 64, 65, 68, 106, 161, and 162 of, to add Article 10.5 (commencing with Section 167.1) to, and to repeal Sections 27 and 60 of, the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session), and to amend Section 100 of Chapter 29 of the Statutes of 1967, relating to the Estero Municipal Improvement District, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor August 28, 1967. Filed with Secretary of State August 28, 1697.]

The people of the State of California do enact as follows.

SECTION 1. Section 20 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 20. "Voter," except as otherwise provided herein, means an owner, or the officer appointed therefor by the board of directors of a corporation owner, or the legal representative of the owner.

SEC. 1.5 Section 21 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 21. "Officers of election," other than officers provided for elections conducted pursuant to the Uniform District Election Law, consist of an inspector and two judges. They shall be persons appointed by the board of directors and need not be voters.

SEC. 2. Section 22 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 22. In the application to the district of laws, the procedure of which is made applicable to proceedings of the district, terms used in those laws shall have the following meanings:

(a) "City council," "council" and "legislative body" mean board.

(b) "City," "municipality" and "local agency" mean district.

(c) "Clerk" and "city clerk" mean the secretary of the district.

(d) "Superintendent of streets," "street superintendent" and "city engineer" mean the engineer of the district or other person appointed to perform such duties, to be called district engineer.

(e) "Tax collector" means the tax collector of the district.

(f) "Treasurer" and "city treasurer" mean the county treasurer or district finance officer.

(g) "Auditor" means the county controller or district finance officer.

(h) "Budget Law" means Chapter 1 (commencing at Section 29000) of Division 3 of Title 3 of the Government Code.

(i) "Uniform District Election Law" means Part 3 (commencing with Section 23500) of Division 12 of the Elections Code.

SEC. 3. Section 26 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 26. The board is the governing body of the district and, commencing with the last Friday in December, 1967, shall consist of five (5) members.

one of whom shall be president. The officers of the district are the five members of the board and a secretary. The district may have a finance officer and other officers as the board may from time to time create.

SEC. 4. Section 27 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is repealed.

SEC. 5. Section 28 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 28. Except as otherwise provided in this section, two directors shall be owners or officers or legal representatives of owners, two shall be registered voters resident within the district, and one shall be a public member designated and appointed by the county board of supervisors. The term of the public member commencing in March, 1968, shall expire on the last Friday of December, 1969, and succeeding terms shall thereafter be filled by nomination and election or appointment pursuant to the Uniform District Election Law by registered voters resident within the district.

Landowner-directors shall be nominated and shall be elected or appointed pursuant to Article 4 (commencing with Section 55) of this act at elections to be held on the fourth Tuesday in March of 1968 and 1970. The terms of the directors elected or appointed at such times shall run until the last Friday in De-

cember, 1971. Thereafter, said offices shall be filled by nomination and election or appointment pursuant to the Uniform District Election Law by registered voters resident within the district.

A general district election shall be held on the first Tuesday after the first Monday in November, 1967, pursuant to the Uniform District Election Law for the purpose of filling two offices of director. Such offices shall be filled by and voted upon by registered voters resident within the district and qualified to vote on said date. The two candidates receiving the highest number of votes shall be deemed elected, the one with the highest votes to serve for four years and the one with the next highest number of votes to serve for two years. All subsequent terms of office filled pursuant to the Uniform District Election Law shall be for four years.

Commencing with the election to be held on the first Tuesday after the first Monday in November, 1971, no person shall be qualified to be elected or appointed to the office of director nor to vote at any district election who is not a registered voter resident within the district.

SEC. 6. Section 29 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

SEC. 29. Except as otherwise provided in Section 28, the term of each director, after the first board, shall be four years, or until the election or appointment, and qualification of his successor.

SEC. 7. Section 55 of the Estero Municipal Improvement District Act (Chapter 82 of the statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 55. A general district election, governed by the provisions of the Uniform District Election Law, shall be held on the first Tuesday after the first Monday in November of each odd-numbered year. A district election for the purpose of electing landowner-directors shall be held on the fourth Tuesday in March of 1968 and 1970.

SEC. 8. Section 57 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 57. The hours during which the polls shall be opened at any special district election shall be as established by the board.

SEC. 9. Section 58 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 58. Notices of special elections shall be given as nearly as practicable in accordance with the general laws regarding notices of municipal elections.

SEC. 10. Section 59 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 59. Nominations for the position of landowner-director shall be in writing, shall be signed by

voters representing at least 10 percent of the assessed valuation of land in the district as shown by the last equalized assessment roll, shall be filed with the secretary of the district, not more than 45 nor less than 25 days before the election.

SEC. 11. Section 60 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is repealed.

SEC. 12. Section 61 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 61. If on the 24th day prior to a landowner district election pursuant to this article, only one person has been nominated for each of the positions to be filled at that election, or no person has been nominated for any such office, or offices, an election shall not be held.

SEC. 14. Section 63 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 63. If, pursuant to Section 62, an election is not held, the Board of Supervisors of the County of San Mateo, at a meeting held prior to the day fixed for the election, shall appoint to the positions of directors those persons nominated, or, if no persons are nominated, any qualified persons, who shall qualify and serve as if elected at a general district election.

SEC. 15. Section 64 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes

of 1960, First Extraordinary Session) is amended to read:

Sec. 64. Except as herein otherwise provided, each voter shall have one vote for one dollar ($1) in assessed valuation of land owned by him as shown by the last equalized assessment roll.

SEC. 16. Section 65 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 65. A majority of the votes cast shall be required to approve a proposition.

SEC. 19. Section 68 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 68. Except as provided in this act a special election shall be conducted as nearly as practicable in accordance with the general laws for cities.

SEC. 19.1. Section 106 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 106. By resolution adopted by a four-fifths vote of all of its members, when in its judgment it is advisable, the board may call an election and submit to the voters of the district the question of whether bonds shall be issued.

SEC. 19.2. Section 161 of the Estero Municipal Improvement District Act (Chapter 82 of the Stat-

utes of 1960, First Extraordinary Session) is amended to read:

Sec. 161. Annually, at least fifteen (15) days before the first day of the month in which the board of supervisors is required by law to levy the amount of taxes required by law for county purposes, the board shall furnish to the board of supervisors a written statement of the following:

1. The amount necessary to pay the interest on bonds for that year, and the portion of the principal that is to become due before the time for making the next general tax levy. Said statement shall separately set forth the amounts required for each issue of bonds as defined in Section 122. If a zone or zones have been established pursuant to Article 10.5 (commencing with Section 167.1), the statement shall separately set forth the amounts required within each zone. The statement shall also state for each zone whether the tax base is to be land, land and improvements, or all taxable property.

2. The amount necessary to maintain, operate, extend, or repair any work or improvements of the district, and to defray all other expenses incidental to the exercise of any of the district powers or to pay any existing obligations of the district.

SEC. 19.3. Section 162 of the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session) is amended to read:

Sec. 162. Except as set forth in Article 10.5 (commencing with Section 167.1), the board of super-

visors shall at the time and in the manner of levying other county taxes, levy and cause to be collected a tax upon the taxable real and personal property in the district, based upon the last equalized assessment roll of the county, sufficient to pay the amounts set forth in the statement of the board. The aggregate taxes levied for any one fiscal year, other than those levied to pay the principal and interest on bonds, shall not exceed five dollars ($5) on each one hundred dollars ($100) of the assessed valuation of taxable real and personal property in the district.

SEC. 19.4. Article 10.5 (commencing with Section 167.1) is added to the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session), to read:

Article 10.5. Zones

Sec. 167.1. From and after the effective date of this section, if, in the judgment of the board of directors, varying benefits are or will be derived by the different parcels of land lying within the district from the expenditure of bond proceeds for any one or more of the purposes authorized by Article 5 (commencing with Section 75), the district may be divided into a zone or zones according to such benefits. After the establishment of such a zone or zones, any tax levied to pay the principal of and interest on bonds heretofore or hereafter authorized to be issued by the voters of the district for such purposes may be levied and collected upon the taxable property within each zone in accordance with the percentage of the sum to

be raised each year in such zone by the levy and collection of said tax.

Sec. 167.2. The district may be divided into as many zones, up to the total number of parcels of land in the district, as may be deemed proper for each bond purpose, and each zone may be composed of and include all of the lands within the district which will be benefited in like measure for such purpose. A parcel of land may be included in as many zones as may be necessary in order to reflect the relative benefits derived by it from various bond issues.

Sec. 167.3. Before establishing any zones or changing a parcel of land from one zone to another, the board of directors shall by resolution direct the preparation of a report in writing by a qualified registered civil engineer employed by the district for the purpose. Such report shall be filed with the district secretary and shall contain:

(a) The percentages or other method of apportionment to be used to determine the amounts to be raised from the lands in each zone; and

(b) A map or plat of the district showing the parcels of land within the district existing at the time of the report, as nearly as may be, and designating each zone by a different letter or number and by separate boundaries, coloring or other convenient and graphic method, so that all persons interested may with accuracy ascertain within which zone any parcel of land is located. If deemed advisable, a separate map or plat may be prepared for each bond purpose for which zones are created or several purposes may

be combined. Such map or plat shall also refer to the parcels of land by their respective county assessor's parcel numbers.

Sec. 167.4. When the report is filed, it shall be considered by the board of directors who may modify it in any respect. After passing upon the report, the board by resolution shall appoint a time and place for hearing protests to the proposed zone or zones and the method of allocation and shall direct the district secretary to give notice of the hearing by publication pursuant to Section 6062a of the Government Code in a newspaper of general circulation within the district. The hearing shall be held not less than 14 days after the passage of the resolution. The secretary shall also cause notice of the hearing to be posted conspicuously in at least three public places within the district. Such posting shall be completed at least 10 days before the date set for hearing protests.

Sec. 167.5. At least 10 days before the date set for hearing of protests, the secretary shall mail, postage prepaid, notice of the hearing to all persons owning taxable property proposed to be included within a zone whose names and addresses appear on the last equalized assessment roll for county taxes or who are known to the secretary. The failure of the secretary to mail the notice to any property owner or the failure of any property owner to receive the notice shall not affect the validity of any proceedings taken under this article. If property assessed by the state under Section 14 of Article XIII of the Constitution is proposed to be included within a zone, such notice shall be mailed to every owner of such property at

the address thereof shown on the last board roll transmitted to the county auditor.

Sec. 167.6. Any interested person may object to the proposed zones or to the method of allocation by filing a written protest with the secretary at or before the time set for hearing. Such protest must contain a description of the property in which each signer thereof is interested sufficient to identify the same, and if the signers are not shown on the last equalized assessment roll as the owners of such property, must contain or be accompanied by written evidence that such signers are the owners of such property or are obligated to pay the taxes thereon. The secretary shall endorse on each protest the date of its receipt, and at the time appointed for the hearing shall present to the board of directors all protests filed with him.

Sec. 167.7. At the time fixed for hearing, the board of directors shall consider the protests and either conform, modify or correct the zones and the method of apportionment. It shall thereafter by resolution order the establishment of the zones and declare its action upon the report. The resolution shall be final and conclusive as to all persons, and thereafter any levies required to be made for the payment of principal of and interest on bonds shall be made in accordance therewith and not on the present districtwide annual ad valorem basis.

Sec. 167.8. After the adoption of the resolution ordering the establishment of zones, a certified copy thereof, together with a certified copy of the report as confirmed, modified or corrected, shall be filed with

the county assessor. The secretary shall also make such filings as may be required with the State Board of Equalization pursuant to Chapter 8 (commencing with Section 54900) of Part 1, Division 2, Title 5 of the Government Code. The filing with the county assessor required by this section shall be deemed a filing pursuant to said Chapter 8 and no further filings need be made.

Sec. 167.9. In the event that the board of directors may deem it advisable to divide an existing zone or to change or modify one or more zones, it shall order a report and hold hearings thereon in the same manner as provided for the establishment of zones by this article, but the report and the notice and hearing thereon shall be limited to the area and zones affected by the proposed changes. From and after the approval of such changes as determined by the board of directors, and following the making of the filings required by Section 167.8, all subsequent tax levies shall be in accordance with such changes.

Sec. 167.10. If, in the judgment of the board of directors, at the time it makes a determination as provided in Section 167.1, as to bonds issued for purposes of reclamation; drainage of roads, streets and public places, including, but not limited to curbs, gutters, sidewalks, grading, paving; culverts, bridges, underpasses or viaducts; or street and highway lighting facilities, varying benefits will be more equitably apportioned among the several lots or parcels of land within a zone by the levy of taxes, to pay the principal and interest of said bonds, upon the taxable land

and improvements or taxable land only within the zone, for a particular issue of bonds, it shall preliminarily so determine. In such event, the report prepared pursuant to Section 167.3 shall contain such information as will present the comparative difference between such tax base and the basis of all taxable property. The notices shall contain a statement of the preliminary determination and proposed action and the matter shall be heard and finally determined as provided in Sections 167.1 to 167.9, inclusive.

SEC. 19.6. Section 100 of Chapter 29 of the Statutes of 1967 is amended to read:

Sec. 100. This act, with the exception of Section 99, shall become operative on January 1, 1969. Section 99 shall become operative on the 61st day following the adjournment of the 1967 Regular Session. Sections 59.1 to 72, inclusive, of this act shall not become operative if Assembly Bill No. 984 is enacted by the Legislature at the 1967 Regular Session.

SEC. 19.7. Any litigation putting in issue the validity of, or the exercise of any express or implied powers granted by, the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session), or the validity of the creation of the Estero Municipal Improvement District or of any bonds issued or to be issued pursuant to that act, shall be set for trial at the earliest possible date and shall take precedence in the trial courts and the appellate courts of all other cases, except older matters of the same character, and matters to which special precedence may be given by law.

SEC. 20. Notwithstanding the provisions of the Uniform District Election Law, any director of the Estero Municipal Improvement District serving in the office on the date of the November 1967 general district election shall serve out the term for which he was elected or appointed. Each director elected at the November 1967 general district election shall not qualify for the office to which he was elected until the term of his predecessor has expired, however the term of each director elected at the November 1967 election shall commence from and including the last Friday in December of 1967.

SEC. 21. This act is intended to implement the recommendations of the Assembly Interim Committee on Municipal and County Government as set forth in Volume 6, No. 24, of the committee report to the 1967 Legislature.

SEC. 22. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order to make certain that this act will become effective in time for the November 1967 General Election, and in order to avoid a drastic tax increase which would result from an inability to sell bonds to pay capitalized interest, issued pursuant to the Estero Municipal Improvement District Act (Chapter 82 of the Statutes of 1960, First Extraordinary Session), because of pending litigation, it is necessary that this act take effect immediately.